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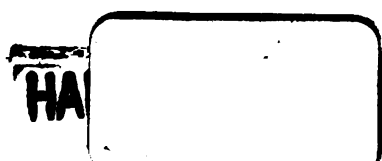
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W. H. Moore *J. H. Adams*
1 Feb 7 1816

CASES
ARGUED AND DETERMINED
IN
THE COURT
FOR
THE TRIAL OF IMPEACHMENTS
AND
CORRECTION OF ERRORS
IN
THE STATE OF NEW-YORK,
IN FEBRUARY, 1805.

TO WHICH ARE ADDED,
SOME OLD DECISIONS BOTH IN THAT AND THE
SUPREME COURT.

VOL. II.

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1796

NEW-YORK:

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1807.

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"Cases argued and determined in the Court for the Trial of Impeachments and Correction of Errors in the State of New-York.—In February, 1805.—To which are added, some old Decisions both in that and the Supreme Court. VOL. II."

—•••••

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EDWARD DUNSCOMB,
Clerk of the District of New-York.

Rec. Nov. 28 1893

TABLE OF CASES.

| | Page. | | Page. |
|-------------------------------|-------|--|-------|
| B | | Le Roy and others v. Lewis | |
| BETTS v. Turner, | 305 | and others, | 175 |
| Bloodgood v. Zeily, | 124 | Lewis v. Burr, | 195 |
| Brown and others v. Robinson, | | Lodge v. Rhelphs, | 321 |
| and Hartshorne, | 341 | Ludlow and Ludlow v. Si- | |
| Bush v. Livingston and Town- | | mond, | 1 |
| send, | 66 | Ludlow v. Dale, | 348 |
| C | | M | |
| Cortelyou v. Lansing, | 200 | Munro and others v. Aire, | 183 |
| Covenhoven v. Seaman and | | N | |
| others, | 322 | Newkerk and wife v. Willett, | |
| Cuyler and others v. Bradt | | | 296 |
| and others, | 326 | P | |
| F | | People v. Sessions of Chenango, | |
| Frost v. Carter, | 311 | | 319 |
| H | | S | |
| Hallet and Bowne v. Jenks, | 86 | Smith v. Williams, | 110 |
| J | | Smith v. Bell and others, | 153 |
| Jackson, ex dem. Loan-offi- | | Smith v. Steinbach, | 158 |
| cers of Rensselaer, v. Bull, | 301 | Smith v. Hammond, | 337 |
| Jackson, ex dem. Van Alen, | | T | |
| v. Rogers, | 314 | Taylor v. Delancey, | |
| Johnson v. Bloodgood, | 303 | | 143 |
| Judah v. Randall, | 324 | V | |
| L | | Vandenheuvel v. The United | |
| Laight and others v. Morgan | | Insurance Company, | 217 |
| and others, | 344 | W | |
| | | Wetmore v. White and White, | |
| | | | 87 |

ADVERTISEMENT.

***MOST** of the decisions which follow the adjudications of 1805, are cases often cited at the bar, and as often denied or disputed. To make known what they are, they are now published.*

CASES
ARGUED AND DETERMINED
 IN THE
COURT FOR THE TRIAL OF IMPEACHMENTS
 AND
CORRECTION OF ERRORS,
 IN THE
STATE OF NEW-YORK.

FEBRUARY, 1805.

Daniel and Gulian Ludlow, appellants,
 against
Lewis Simond, respondent.

ALBANY,
 February, 1805.
 D. & G. Ludlow
 v.
 Simond.

ON appeal from a decision of the Chancellor, dismissing the appellants' bill with costs.

The appellants, on the 11th of *March*, 1799, entered into an agreement with *Angier Marie Leremboure*, and the respondent, by which, *Leremboure* was to load on board one or more vessels, such a quantity of tobacco and *Havanna* sugars, the former at 10 and a half and 11 cents *per lb.* the latter at 15 dollars 75 cents *per cwt.* for the brown, and 19 dollars for the white, as would form a capital of about 40,000 dollars, after deducting the drawback. The goods thus shipped, to be consigned, under a bill of lading, by *Daniel Ludlow & Co.* to Messrs. *Buildemaker & Co.* their correspondents at *Hamburgh*, to be sold for the

If a surety engage to make good the deficiency arising from a sale of goods at a given place, and consigned to the correspondent of the person to whom the security is given, who has the whole controul of the adventure, a sale by the consignee at another place releases the surety. Though relief at law may be had, yet, if it be doubtful, equity will retain the bill.

ALBANY,
February, 1805.

D. & G. Ludlow
v.

Simond.

account and risk of *Leremboure*. *Ludlow & Co.* to furnish *Leremboure* with their notes, to order, for the above amount of 40,000 dollars, payable, one-half at four, and the other half at six months; each half to be divided in several parts, to be delivered so as to complete each particular shipment, and the amount to be fully insured by one of the insurance companies, or other respectable underwriters, of the city of *New-York*.—For this, *Ludlow & Co.* to be allowed a commission of 2 1-2 *per cent*, on the invoices of the goods put on board.—To secure to *Ludlow & Co.* the repayment of the 40,000 dollars, together with the above commission, *Leremboure* to assign the policies covering the shipments, and in case of the capture or loss of any, *Ludlow & Co.* to receive from the underwriters the amount of their subscriptions. Should this mode of reimbursement not take place, *Ludlow & Co.* were authorised to draw at 60 days sight on *London*, twenty days before their notes respectively became due, at the then current exchange, and to order the necessary remittances to be made by *Buildemaker & Co.* to their friends in *London*, or to whom they may value on, to meet their drafts; the remittances to be made at the risk of *Leremboure*, both as to the validity of the bills and solvability of the house in *London*, to whom the same might be made. *Ludlow & Co.* to be allowed a further commission of 1 1-4 *per cent* on the amount of all bills they might draw. If the proceeds of the sales at *Hamburgh*, so disposed of, should not prove sufficient to reimburse *Ludlow & Co.* the amount of their several notes, together with interest on their advances, commissions, and all other

charges, *Leremboure* to make good the deficiency, so soon as ascertained, by giving his note to *Ludlow & Co.* payable at 60 days, the same to be indorsed by *Simond & Co.* who thereby agreed thereto, *Ludlow & Co.* obligating themselves, if the proceeds of the several shipments exceeded the amount due them, to pay the difference when in cash ; the parties binding themselves to each other in the sum of 100,000 dollars for the due performance of the agreement, which was executed in the names of

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

DANIEL LUDLOW & Co. (L.S.)
A. M. LEREMBOURE, (L.S.)
L. SIMOND & Co. (L.S.)

In pursuance of the above contract, *Ludlow & Co.* on the day of the agreement, furnished *Leremboure* with three notes for 3,000 dollars, two for 2,500 dollars, three for 2,000 dollars, payable in six months, and one for 2,697 dollars 99 cents, at 4 months ; *Leremboure*, at the same time, assigning to them policies of assurance to the amount of 40,000 dollars on the cargoes of two ships loaded by him with sugar and tobacco, marked *D. L.* which were, by *Ludlow & Co.* consigned and ordered to be sold according to the terms of their engagement. On the 6th of *April* following, *Ludlow & Co.* gave *Leremboure* other notes, making up the sum of 36,431 dollars 88 cents.

The cargoes thus shipped, and consigned to *Buil-demaker & Co.* at *Hamburgh*, arrived safe, but previous to their reaching that port, several great failures had taken place, which induced a very considerable change in the market. In consequence of this,

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

Buildemaker & Co. without any direction from the appellants, sent the tobacco to *Rotterdam*, addressed to their own correspondent, *Roquette Buildemaker*, who, in *July*, 1800, sold it for about 14,126 dollars 85 cents net, which he paid over to *Ludlow & Co.* In the *October* following, the appellants, having ascertained the balance due, presented the accounts of the sales of the tobacco to *Leremboure*, who acknowledged they were right, but, as he was then insolvent and confined for debt, declined giving his note for the deficiency, though the appellants demanded it. Sixty-three days after this refusal, *Ludlow & Co.* called on the respondent, and requested him to pay the amount of the loss, which he refusing to do, they filed their bill against him and the respondent, setting forth the above facts, charging a combination to refuse giving the note, praying that the accounts between them and *Leremboure*, arising under the agreement, might be taken, that *Leremboure* and the respondent might be decreed to make good the deficiency or balance, and that they themselves might be decreed such other relief as their case might require.

Simond put in his answer, stating, that without having any interest in the contract, or expecting to receive any benefit from it, he consented to become surety for *Leremboure*, and did, with him, execute the agreement in the name of *Lewis Simond & Co.* though, not having any partner, he himself was solely bound by the signature. The answer, also, admitted the facts as detailed, except as to the effect of the failures at *Hamburgh*, of which it stated his ignorance, but averred, that the reshipment of the tobacco for *Rotterdam*, and sale of it there, was without the consent

of *Leremboure* or himself ; in consequence of which, *Leremboure* refused to give the note mentioned in the agreement, and he to pay or make good the deficiency, considering themselves released from all obligation to do the one or the other,

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

To establish the price of tobacco at *Hamburgh*, in the summer of 1799, *I. L. Steinbach* and *John H. Schmidt* were examined, but the first could prove nothing as to the point, and the latter, only that *Virginia* tobacco, at *Hamburgh*, was, from the month of *October*, 1799, to the end of the year, at 3s. 9d. to 4s. *Hamburgh* currency, *per lb.* that *Maryland* was higher, and that the price continued the same in 1800, but what it was in the summer of 1799 he could not tell.

To prove the execution of the agreement *William M. Seton* and *Martin Hoffman* were examined, who deposed, that they saw “ *Daniel Ludlow* and *Gulian Ludlow*, the complainants, and *Angier Marie Leremboure* and *Lewis Simond*, execute the contract.”

The cause being heard, on the above admissions and testimony, his honour the Chancellor pronounced the decree, now appealed from, and thus assigned his reasons :

Mr. President. On this case several questions have been made, but a preliminary consideration is—

Whether the bill can be sustained in this court ?

The informality in the execution of the contract, might, of itself, be sufficient to repel the allegation, that the matter in the bill is not cognizable here, as it was determined while I was in the supreme court,* that an execution of a sealed instrument by one part-

* *Becker v. Kirk*,
July term, 1791.

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

ner, in the name of the firm, was invalid, and it was for that reason rejected as evidence. But in this case it is not necessary, nor do I mean to ground my opinion on that point, for there is another head of equity which must sustain the bill.

The defendant, *Leremboure*, has refused to give his note, and it does not appear to me that any form of pleading at law, would enable the complainants to allege the not indorsing a note *which never was in existence*, as a breach of contract by the defendant, *Simond*, or as cause of action in any other shape; the making of the note would there, as to the defendant, *Simond*, be considered in the nature of a condition precedent; and if it could be made out in proof, that the not making it was the effect of fraud or collusion, it would, perhaps, not better the condition of the complainants, for it would then become one of the peculiar objects of the jurisdiction of this court, but there certainly could be no valid reason for coming here to account, as the accounting in this case can only be required from the complainants.

I, therefore, proceed to consider the questions applying to the merits; these are—

1st. Whether the agreement was a valid one, as the complainants are described as *Daniel Ludlow & Co.* and have executed it with one seal only?

2d. Whether the house of *Buildemaker & Co.* were the joint agents of both, or the agents of either exclusively?

3d. Whether the defendant, *Simond*, was an original party in interest in the contract, or only introduced as surety? and if as surety,

4th. Whether the deviation from the terms of the contract in its execution, has not discharged him ? and,

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

5th. It has been insisted, that as the defendant, *Simond*, is not liable at law, this court will not carry his responsibility beyond it.

As to the first question, if the contract was invalid, as to the complainants, the consideration on the part of the defendants must have failed also, and of consequence it was insisted the whole transaction was nugatory.

To the contract, appears the signature of "*Daniel Ludlow & Co.*" collectively, as one of the parties ; both the complainants, however, were present, and the subscribing witnesses depose, that *both executed it*.

Whether this inference was drawn from the erroneous opinion, that the act of one copartner may bind the other in all cases, respecting their common concerns, *whether the act is with or without seal*, or whether they both actually and formally sealed and acknowledged the instrument as their act and deed, cannot be determined from the depositions—it is a fact proved that both executed it.

The signature of the contracting parties, is in the ordinary and regular form ; but it is not an essential part of the execution : the sealing and delivery are of its essence, and I know of no law which will prevent a plurality of parties from acknowledging one seal affixed to an instrument, as the seal of each party separately ; for the mere recognition of a seal does not, in its modern use, amount to an exclusive appropriation, so as to prevent the other parties to the instrument,

ALBANY,
February, 1805

D. & G. Ludlow
v.
Simond.

from using it as their own, for all the purposes of giving validity to the deed, to which it is affixed, as their act; but in this instance, whether the paper in question is considered as a deed, or depending upon the principles regulating simple contracts, will not vary its operation. Before it assumed the shape of a deed, and had the formalities attending its being constituted such, attached to it, the contract had received a definite complexion. The terms had been arranged and precisely ascertained by the convention of the parties, and it would emphatically be entangling justice in the net of form to sustain an objection on that ground here—for the existence and terms of the contract are the only objects, as far as respects this point in contest between the parties; and that these were authenticated with a greater degree of formality, than the strict rules of law require, cannot certainly detract from the evidence of its existence.

It will be perceived, that I do not rely on the acts of the parties in its execution, which might, in all events, have a determining effect in one point of view; that I do not now mean to pursue.

As to the second question.

To determine this, it may be necessary to examine the general scope and object of the contract, and to review its different details.

The leading motives of the defendant, *Leremboure*, seem to have been, to avail himself of the agency of the complainants, perhaps as a protection against the captures of belligerents, and the reduction of the premium of insurance, and certainly of their credit, to give him an earlier command of the funds, ex-

pected to arise from the consignments of his sugars and tobacco to *Hamburgh*, and on the part of the complainants, the receipt of the commission stipulated by the contract.

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

The contract was so arranged, as to afford the complainants every reasonable security against ultimate loss, and much more so than could apply to ordinary commercial speculations, if the business was correctly managed, according to the directions contained in the contract.

It multiplied the guards against loss by reposing, first, on the responsibility of *Leremboure*; secondly, and principally, on the subject consigned; and thirdly, on the defendant, *Simond*, whose ability to respond does not appear to be questioned.

The contract stipulates, that *Leremboure* shall put on board one or more vessels, tobacco and sugars, at *fixed prices*, to the amount of about 40,000 dollars; that those goods shall be consigned under bills of lading of the complainants, to *Buildemaker & Co. their correspondents at Hamburgh*, to be sold for the account and risk of the defendant, *Leremboure*; that he shall insure them, and assign the policies of insurance to the complainant, who shall receive from the underwriters the amount of any losses which shall be applied to the reimbursement of the complainants.

The complainants agree to furnish their notes to the defendant, *Leremboure*, to the amount of the several shipments, fully insured, one half payable in four, the other half in six months, and to pay any surplus which may remain, after they have been satisfied, to *Leremboure*.

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

If the policies did not afford a means of reimbursement, then the complainants were authorised to draw, *twenty days before their notes became due*, at the then current exchange, at 60 days on *London*, and to order the necessary remittances to be made by *Buildemaker & Co.* to their friends in *London*, on whom they might value, to meet their drafts—for which the complainants were to receive an additional commission of one and one quarter per cent, on the amount of such drafts.

If the proceeds of the sales at *Hamburgh*, should prove inadequate to reimburse the complainants, the defendant, *Leremboure*, agreed to make good the deficiency as soon as ascertained, by giving his note to the complainants, payable at 60 days, and then follows, “the same to be indorsed by *L. Simond & Co.* who hereby agree thereto.”

The house of *Buildemaker & Co.* are described as the correspondents of the complainants at *Hamburgh*—the complainants are authorised to order the necessary remittances to be made by that house, to *London*—they were to consign the tobacco and sugars, which were particularly valued, under their (the complainants) names, to the same house—the policies were to be assigned to them—*Buildemaker & Co.* were to make a selection of a house in *London*, to which the remittance was to be made by them, from *Hamburgh*, though that remittance was to be made, both as to the validity of the bills and solvability of the house in *London*, at the risk of the defendant, *Leremboure*.

All these are strong marks of a determination completely to devolve the controul of the subject upon

the complainants—of a total abandonment of the right of interfering in the management of the fund, destined to secure the complainants against the responsibilities they might incur, until its disposition should have been effected; and after this was consummated, the defendant, *Leremboure*, was even to receive the surplus from the hands of the complainants, and not from *Buildemaker & Co.* to whom a resort must of course have been had, if they were the joint agents of the parties.

ALBANY,
February, 1805.
D. & G. Ludlow
v.
Simond.

The description of *Buildemaker & Co.* as *correspondents* of the complainants, in mercantile language, is somewhat more forcible than in common parlance—it indicates persons with whom they were in the habit of doing business, and in this instance it can only have been introduced to show, that in the capacity of the correspondents or agents of the complainants, they were to be entrusted with the management of the concern.

If that were not the case, one of the links in the chain of security, which the complainants evidently intended to rely on, would have been effectually broken.

The assignment of the policies of insurance was intended to afford a fund for the complainants' indemnity, in case of loss *in transitu*. Upon the arrival of the subject at its destined port, it was to be committed to the *complainants' consignees*, at the risk and for the *ultimate* account of the defendant, *Leremboure*—but *exclusively* subject to the disposition of the complainants; for they were authorised to order the proceeds to be remitted to *London*, and unless this could be done without the interruption or controul

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

of the defendant, *Leremboure*, the fund, on the credit of which the complainants had given their notes, might have been withdrawn, and none left to satisfy the bills which they were authorised to draw on that place.

As to the third point.

The introduction to the contract is, "that *it is agreed between the subscribers*;" this comprised all the parties.

Every subsequent article, the last excepted, on the part of the defendant, is *exclusively* imposed on, or for the benefit of the defendant, *Leremboure*—he is to ship the tobacco and sugars, which are to be sold for his account and risk—he is to assign the policies—he is to be at the risk of the remittances—he is to make good the deficiencies, and he is to receive the surplus, if any.

It has, therefore, notwithstanding this general introduction, a partitive effect; it contains a detail of the stipulations between the complainants and the defendant, *Leremboure*, particularly prescribing the duties and obligations intended to be thereby imposed on each, and then, as a final clause, the defendant, *Leremboure*, "agrees to make good the deficiency as soon as ascertained, by giving his note to *D. Ludlow & Co.* payable at 60 days, the same to be indorsed by *L. Simond & Co. who hereby agree thereto*"—which is an additional indicium of the intent that the defendant, *Simond*, should only be held to pay, if the defendant, *Leremboure*, did not—the relation of principal and surety is strongly inculcated from this circumstance, and the whole tenor of the contract appears to me to support the same.

construction. I am therefore of opinion, that the defendant, *Simond*, is to be considered merely as a surety.

ALBANY,
February, 1808.
D. & G. Ludlow
v.
Simond.

This brings me to the fourth question.

It may tend to elucidate this point, to ascertain the time and place in which the acts preparatory to the liability of the defendant, *Simond*, were to be performed.

1. As to the time.

The contract bears date the 11th day of *March*, 1799; it contains no particular limitation when the shipments were to be made—but it seems, the tobacco and sugar were ready for exportation, as the notes were to be furnished when each particular shipment should be completed, one half payable in four, the other half in six months. It appears that two different shipments were made on the 11th of *March*, (the date of the contract) and the 6th of *April*, 1799, at which time the notes stipulated by the contract were given—the complainants by its terms were authorised to draw on *London*, at 60 days, *twenty days before the days whereon the notes* were limited to be paid, and to direct a remittance of the proceeds of the sales to be made from *Hamburgh* to *London*, to satisfy the bills drawn on the latter place; these shipments, on the data furnished by the contract, would authorise the complainants to draw, in the months of *June* and *August*, for the first, and in *July* and *September*, 1799, for the second—periods which, with the necessary allowance for the transmission of the bills and the 60 days at which they were to be drawn payable, are the criteria from which the intent of the parties, as

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

to the consummation of the transaction, is to be collected.

As to the place.

The consignment was to be made to *Buildemaker & Co. at Hamburgh*—the proceeds of the sales at *Hamburgh*, are spoken of in another part of the contract—the remittance was to be made by *Buildemaker & Co. to London*, the shipments were made to *Hamburgh*, and the insurance limited to that place—all these circumstances pointed to *Hamburgh*, in its locality, for the conversion of the articles shipped, into money; and from which the remittance was to be made.

The time might vary according to circumstances, but an unwarrantable delay, though it might have promoted the advantage of the defendant, *Leremboure*, if he had remained solvent, might be very prejudicial to the defendant, *Simond*, who would thus be prevented from taking measures for his indemnity, which a sense of danger would have prompted, and instead of depending upon an insolvent, he might have been placed at least in a situation to struggle for a plank in the shipwreck. This he is now totally precluded from—it is therefore incumbent on the complainants to show that they have been so vigilant as not to subject him to loss by the non-execution, or delay in the execution of the powers which they had a right by the contract to exercise, and which it is of no consequence to the defendant, *Simond*, whether delayed by the act of the complainants solely, or the joint act of the parties in interest, as the consent of one or both could not vary his

situation, or the precise measures of his responsibility.

ALBANY,
February, 1805.
D. & G. Ludlow
v.
Simond.

The sale of the 169 hogsheads of tobacco took place on the 3d of *July*, 1800, probably more than a year after its arrival at *Hamburgh*, for no part of the evidence ascertains the time of its arrival. During all this time the defendant, *Simond*, was unapprised of the result of the speculation, and precluded from taking the necessary steps to protect himself from loss. So far as respects the place, there is a palpable departure from the terms of the contract, not even satisfactorily explained on the ground of its being advantageous—for the depositions to this point leave the subject where they found it; that of *Joachim Ludwig Steinbach*, does not touch the period during which the tobacco was at *Hamburgh* or *Rotterdam*, and that of *John H. Schmidt*, states the price of *Virginia* tobacco from the month of *October*, eight months after it was embarked for *Hamburgh*, from 3 1-4 to 4 shillings *Hamburgh* currency, *per lb.* and though it has been admitted, that failures of great extent took place at *Hamburgh* about the time the tobacco, in question, arrived at that place, there is no proof of the influence of that circumstance, on the state of the market, nor any reason given why it should affect the tobacco and *not the sugars*.

Indeed, if the evidence given in this cause was apposite, it would show there was a market for tobacco in *Hamburgh*, and that the prevailing price at that place might or might not, according to the different constructions of which this indistinct evidence is susceptible, have been more than the sales ultimately made at *Rotterdam*.

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

The consideration of loss occasioned by parting with money to the principal, in consequence of a reliance on a surety, is as valid and meritorious in all legal and equitable views, as a benefit or profit acquired by the surety personally, and as on the one hand the surety ought to be held, perhaps, with more or less strictness, according to circumstances, to his engagements; so, on the other, the surety's risk ought not to be increased, or his contract varied to his prejudice.

The latter of these positions has been repeatedly recognised in the British courts, and though most of the cases bearing on this point, were adjudged since the revolution, and so no authority here, the principles laid down in them as far as they are necessary to be applied to the present point; that a surety cannot be carried beyond his contract; that the contract made by the parties must be judged of, and not another substituted in its stead; that it cannot be varied without his consent, and that a surety for definite engagements shall not be extended to an indefinite one, appear to me correct.*

* 2 Term Rep.
372. 7 Term
Rep. 256. 2
Brown's Ch. Ca.
579. 2 Vesey,
jun. 540.

These must form solid grounds of equity, by which, if this cause is tested, there is no pretence for charging the defendant, *Simond*.

Here the defendant, *Simond*, became bound for a definite object to respond for deficiencies in sales made at *Hamburgh* in a reasonable time. The complainants seek to charge him for deficiencies arising on sales made at *Rotterdam* at a later period than the contract contemplated, a totally different mart, subject to a different government and laws, exposed to some additional risk, and certainly to additional ex-

pense, from the change of place, and the inconvenience of a change of agents, not entrusted by the parties; for the accounts of sales are subscribed *Roquette Buillemaker*, and not by the firm of *Buillemaker & Co.*

ALBANY,
February, 1805.

D. & G. Ludlow
* v.
Simond.

If it was proper to send the subject to *Rotterdam*, I know of no principle that could have restrained it from being sent to *London*, or even to *Canton*, in quest of a better market.

Upon mature reflection, and a deliberate review of all the circumstances attending this case, I am strongly impressed with the opinion, that the defendant, *Simond*, is not chargeable, and that as to him, the complainants have not sustained their bill, and it must, therefore, be dismissed with costs.

Woodworth, Attorney General, for the appellants. Before the merits of this case are approached, it may be necessary to establish that the suit was rightly commenced in the court of chancery, as the fit and proper tribunal. Equity, has, in many instances, a concurrent jurisdiction with the common law, but it is invariably the *forum* to which recourse is to be had, wherever, upon the principles of universal justice, the interference of a court of judicature is "necessary to prevent a wrong, and the positive law is silent." 1 *Fonb.* 10. n. (f). In matters of account it has almost exclusive jurisdiction, and the mere circumstance of its being requisite to state one, has been held sufficient to warrant a bill. 2 *Eq. Ca. Abr.* 4. Here the basis of the notes to be given, was a balance, that could be ascertained only, by an account. Besides, the refusal of *Leremboure* to give

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

* *Le Neve v.*
Le Neve.

† *Weymouth v.*
Boyer.

the note *Simond* was to indorse, might be the result of combination and fraud, which chancery alone could discover, and relieve. Any suspicion of trick, deceit, and contrivance, is sufficient to give to chancery cognizance of the suit. 3 *Atk.* 654.* If there was any doubt hanging over the case, whether a court of law was adequate to all its emergencies, it would afford acknowledged reason for equitable interposition. 1 *Ves. J.* 424.† It might have been made a question how far the contract, being signed only by one of the appellants, and having but one seal affixed, could be enforced at law. But as it is proved to have been executed by both *Daniel and Gulian Ludlow*, this point cannot now be insisted on, as it is to be inferred they severally appropriated the same seal to themselves. This would be a valid execution by both. In *Ball v. Dunsterville*, 4 *D. & E.* 313, a single seal used by one partner, with the assent of the other, in the name of both, was held obligatory on each. Allowing, however, that there was a remedy at law, that does not of itself oust chancery of jurisdiction. In *Billon v. Hyde*, 1 *Atk.* 128, a verdict, in an action for money had and received, was not deemed to preclude from a recurrence to equity; because the subject of discussion involved matters of contract and account. Nay, though the very reason assigned for going into chancery, be such as the chancellor himself would have allowed the benefit of at law, it does not prevent an application to equity; because it is possible the judge before whom offered, might be of a different opinion. *Burrows v. Jemimo*, 2 *Str.* 733. In mercantile transactions relating to agents and

factors, a concurrent jurisdiction has always been exercised. 3 *Black. Comm.* 437. So where a bond was lost, there was formerly no remedy but in chancery. 1 *Ch. Ca.* 77.* The law is otherwise now, but still relief may be sought as before; and as the present is, perhaps, a case of suretyship, equity is the most appropriate tribunal; for a surety, not liable at law, may be so there; as if his name be not mentioned in the body of an obligation which he has signed. *Crosby v. Middleton and others, Prec. in Chancery*, 309. So equity will in many cases set up against a surety, debts extinguished at law. *Skip v. Huey*, 3 *Atk.* 93. But however forcible the argument against the jurisdiction might have been, it is too late to urge it now. The respondent should have taken advantage of it *primo die*, by plea in abatement. He cannot avail himself of it, after answering and proceeding to a hearing; for by so doing, he has submitted to the jurisdiction. *Penn v. Lord Baltimore*, 1 *Vez.* 447. The merits are grounded chiefly on *Simond's* being but a surety. This, it may be observed, does not expressly appear, and as it is enforcing very strict rules to do away the effect of a contract, the *onus probandi* lay on the respondent. He should have substantiated this by witnesses; for by the instrument it is left in doubt, though it may be inferred. Inference, however, ought not to decide this question; it must turn on the construction of the agreement. The rule on this subject is, that the intent ought to govern. 1 *Fonb.* 427. 3 *Atk.* 136.† *Kaimes's Prin. of Eq.* 204, 239. To effectuate this, equity is more liberal than a court of law. 2 *Atk.* 581.‡ The security of the appellants, was the object of every part of the

ALBANY,
February, 1805.

D. & G. Ludlow
v.

Simond.

* *Underwood v.*
Staney.

† *Smith v.*
Parkhurst.

‡ *Bagehaw v.*
Spencer.

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

contract. The moderate compensation they were to receive, is a proof of this. A commission of 2 1-2 per cent could never be meant as an indemnity for any hazard whatsoever. The goods are to be sold *at the risk of Leremboure*. It was intended therefore, that no loss, resulting from the sale, should be thrown on the appellants. *Simond* assents to this, and guarantees against it. That the property should be sold at *Hamburgh*, was not of the essence of the contract. The goods were to be sent to *Hamburgh*, to be sold, and not to be sold *at Hamburgh*. It was too rigorous to say, that the agents there, had not a discretionary power to send the consignment to a better market. Whatever was *bona fide* done, for the advantage of the principals, is to be protected. It is a mistake to imagine that *Buildemaker & Co.* were the exclusive agents of the appellants. The contract speaks the language of all the parties to it, and that says, the goods shall be sent to *Buildemaker & Co.* They were, therefore, as much the agents of the respondent, as of the appellants. *Leremboure* consents that they shall sell for him, and at his risk. What is this but constituting that house his agent, and with the approbation of *Simond*? If this fact be admitted, it is immaterial whether the agents were authorised to send the goods to *Rotterdam* or not, because it was then the act of the respondent. Allowing, however, that *Buildemaker & Co.* were the agents of the appellants only, and that they had no right to sell at any other place than *Hamburgh*, still the consequences insisted on would not follow. The utmost that could be claimed, would be a deduction adequate to the actual

loss sustained by the breach of duty. Here it is manifest from the account of sales, that there has been a gain by changing the place of sale. Notwithstanding this, the respondent loudly insists, that because he is, from our management, liable to less than he would otherwise have had to pay, he is therefore responsible for nothing. Is this a defence to be endured in equity? It will never surely be urged, that from the period at which the sale took place, *Simond* is released. The contract limits no time; within which they were to be made. Where then is the authority for making it criminal to sell in one month more than in another? A suretyship not restrained within given periods, is not discharged by lapse of time. 1 *Bos. and Pull.* 419.* Should the court be of opinion, that the cause rests on the fact of the property not having sold for more at *Rotterdam*, than it would have produced at *Hamburgh*, an inquiry may be directed on that point, in the same manner as in cases of accounts; it is not unusual to refer them to two merchants. *Gyles v. Wilcox.* 2 *Atk.* 144.

Hoffman, Henry, Van Vechten, and Edwards, contra. The questions in this case, ought to be considered without reference to *Leremboure*, whose acts are not to affect *Simond*, the only real respondent. He, it is evident, on viewing the contract, which is consistent throughout, could be no more than a surety. He has no kind of beneficial interest. Neither in profits nor in commissions does he participate. The only character in which he appears, is that of a guarantee against loss. He has only one solitary act to perform, that of making good any deficiency duly incurred, and legally ascertained. To constitute a man a surety, it is not necessary that in the instrument he should be

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

* *Peel v. Tatlock.*

ALBANY,
February, 1805.

D. & G. Ludlow
v.

Simond.

* *Wright v. Russell.*

† *Barclay v. Lucas.*

‡ *Ratcliffe v. Graves.*

§ *Sheffield v. Lord Castleton.*

¶ *Simpson v. Field.*

• *Bonham v. Newcomb.*

† 3 *Atk.* 93.

‡ 5 *Ch. Rep.* 55.

named as such. If, from its nature or condition, it can be collected, it is sufficient. *Lord Arlington v. Merricke*, 2 *Saund.* 411, and the authorities *in notis*. If, then, the respondent be a surety, of which there seems to be no doubt, he cannot, as all the court held in *Wils.* 539,* be bound beyond the strict letter of his contract. The same principle is acknowledged in 1 *D. & E.* 291. n. (a).† Nor is it extended in equity; for it is there settled, that if not bound at law, a surety shall not be liable there. 1 *Vern.* 196.‡ 2 *Vern.* 393.§ 2 *Ch. Ca.* 22.¶ The reason of these cases is, that sureties have no beneficial interest. They merely exercise their bounty and good will, without consideration. The securities, therefore, into which they enter, stand on the same footing, as voluntary conveyances, which are never helped in equity. 2 *Vent.* 365.* For, before that tribunal, the very motives on which they engage, render them, in all cases, favourites of the court. On this point, every authority cited is a proof. As to the case of *Skip v. Huey*,† that relates only to securities destroyed or lost, by fraud or accident. It does not warrant the extension of a security. And though *Crosby v. Middleton*‡ seems to be against our positions, that case may well be doubted, for in 1 *Fonb.* 38 n. (w) it is queried, and *Sheffield v. Lord Castleton* is almost directly in opposition. As, then, *Simond* is only a surety, and sureties are never, even in equity, liable beyond the letter of their engagements, it will be now incumbent to show, what, by the letter of the present engagement, *Simond* contracted to perform—to make good such deficiency as should arise on the sales of the cargo

at *Hamburgh*. That was the spot at which they were to be made. It is reasonable that a mercantile man, should guarantee the proceeds of a sale at one market, who would, by no means, be responsible for the result at another. The insurances were made no further than to *Hamburgh*, and this alone evinces that the adventure was to be terminated there. The contract, therefore, was varied by sending the goods to *Rotterdam*. It transferred the property from a neutral port to that of a belligerent, and took it out of the security of one, to expose it to the various dangers of the other. This procedure extended, also, the period for which *Simond* was bound. It protracted to more than a year the concluding a speculation, the termination of which, by the words of the contract, was never contemplated to exceed six months. The respondent was, therefore, released. *Nisbet v. Smith*, 2 Bro. Ch. Rep. 584. *Rees v. Berrington*, 2 Ves. J. 542. Against this conclusion it is urged, that *Buildemaker & Co.* were the agents of *Simond*, at least of him and *Leremboure*, or, if not so, then of all parties; but, that they could not be considered as the exclusive representatives of the appellants. The object of the contract, and its various parts, show that *Buildemaker & Co.* were the agents of *Ludlow & Co.* alone. They were the correspondents of the appellants—the shipments were under *their* mark—they were consigned by *them*—the remittances to be according to *their* order—the accounts to be rendered to *them*. In short, *they* were to have the whole controul of the adventure, and under *them* *Buildemaker & Co.* to act, unamenable to, and without any interference of, *Leremboure* or *Simond*. How then could *Buildemaker & Co.* be the agents of persons they never knew,

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

**Skip v. Huey.*

†*Ughtred's case.*

‡ *Hargrave v. Rogers*, cited by
Holt, Ch. J. in
Booth v. Johnson.

of principals by whom they were not to be directed, and to whom they were never to account? It follows, therefore, that they were exclusively the agents of the appellants, who, and not *Simond*, must bear the loss arising from sales made in violation of the contract. For, it was by the *Ludlows* that confidence was placed in *Buildemaker & Co.* and the rule in equity is, that

“he who trusts most shall lose most.” 3 *Atk.* 93.*

Another reason, against the claim of the appellants, arises from the very manner in which *Simond* consented to be liable. He engaged to indorse such note as *Leremboure* should give for such deficiency as should be ascertained on sales at *Hamburgh*. Suppose a note had been given by *Leremboure*, and on the respondent's refusal to indorse, an action of covenant, which, indeed, is the true and only remedy, had been brought for the breach of contract, would not the plaintiff have been obliged to aver, that the sales were made at *Hamburgh*, the deficiency on such sales ascertained, and the making of the note? These various circumstances must, therefore, be deemed conditions precedent to the liability of *Simond*; and if so, he cannot be responsible till they are performed. For, where a condition is precedent, it must be shown to have

been literally fulfilled. 7 *Rep.* 9 to 11.† It admits of no equivalent, because it is *stricti juris*. 5 *Vin. Abr. tit. condition.* 145 pl. 27. *Co. Litt.* 218, (a). Nothing can be argued from the acknowledgments of *Leremboure*, stated in the case. The contract of one man cannot be varied by the act of another. If I enter into a bond to pay such sum as A. shall, after 8 days warning to appear, be condemned in, if A. appear without notice and be cast, my bond will not be forfeited. 7 *Mod.* 144.‡ On every point, therefore, sup-

posing the court below had cognizance of the matter, the decision was correct. But we contend, the appellants had no right to ask the interference of that tribunal, and that the dismissal of the bill, if improperly ordered on the grounds taken by the Chancellor, must now be directed, for want of jurisdiction. Redress was open at law, in an action for damages. There alone it ought to have been sought, and there every satisfaction might have been obtained. On the principle of account, the bill could never have been sustained; because of no privity in *Simond* with respect to any of the transactions. Nothing rested in his knowledge, which he could disclose, and he, consequently, was not liable to be called to an account in Chancery. *Com. Di. tit. Chancery, 2 A.* throughout. *2 Fonb.* 182, 3 note (n) *1 Eq. Ca. Abr.* 5 note (n) also. The concurrent jurisdiction of equity, in matters of account, arises only from the right to obtain a discovery, in which case, the bill is retained for the purpose of relief. *1 Fonb.* 10 n. (f) But what discovery can be obtained from *Simond*? The prayer of the bill is, in fact, for damages; not for a specific execution, and carries, therefore, in itself, a convincing proof, that the application ought to have been to another *forum*. The authorities cited to establish that it is now too late to urge any thing against the jurisdiction, only prove, that when a defendant does not, in his answer, make the cognizance of the court a point, he waives it—not that he cannot urge it in his answer. A defendant may, in his answer, insist upon his law. *3 P. W.* 95.* *Hinde* 200. *2 P. W.* 238.† The omission of a defendant, will not confer jurisdiction.

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

* *Harris v. Ingledew.*
† *Wroatsley v. Bendish.*

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

Pendleton and *Harison*, in reply. It is a principle of chancery, that, on a bill to account, both parties are actors, and, therefore, if *Ludlow & Co.* were alone to render one, still it would be a proper mode; for, it often happens that, from motives of prudence, a trustee has recourse to a settlement in equity. To form an adequate judgment on the present occasion, the situation in which the appellants stood must be considered. They, in truth, were only trustees for *Leremboure*, to be, at all events, guaranteed against any loss from undertaking the office, and, with that view, *Simond* entered into the contract. Adopting, then, these ideas, we admit that the intent ought to govern in the exposition. But in making this exposition, it ought to be recollected that the contract, now before the court, and on which the liability of the respondent arises, was of a mercantile nature. A liberal construction, such as would be given to a will, is that which, it is presumed, it would be proper to adopt. The doctrine, then, of conditions precedent, must necessarily be exploded; nor, indeed, could it ever apply, except by overlooking the distinction between those conditions which lie in compensation, and those which do not. Viewing, then, this as a commercial transaction, in which the appellants became trustees, on consideration of being kept harmless, it follows, that, if their conduct has been *bona fide*, they are entitled to the indemnity, on the faith of which they undertook the trust. The very essence of it was reimbursement for the notes they gave, or the bills they might draw. Any deficiency, however arising, was, if they were not in fault, to be made good. Suppose the property had been consumed by fire, in ware-houses, at *Hamburgh*, must the appellants have borne the loss? Yet,

to this, and a hundred other equally gross results, would the reasoning on conditions precedent necessarily lead. It is a mistake to say, that *Buildemaker & Co.* were the exclusive agents of the *Ludlows*. They were equally agents of the *cestui que trust*, being nominated, or assented to by all parties, for the purpose of carrying the contract into effect. But allowing the arguments against us, on this point, to be correct, who ever heard that a trustee was liable for the conduct of an agent, appointed *bona fide*, and within the limits of his authority? We deny, however, that these agents have been guilty of any misbehaviour. It is within the scope of an agent's power to change the place of sale. He is not bound to sell on the spot where the goods are consigned to him. He may transmit them to another market, and all that is required, in the exercise of this discretion, is, that it should not be at an unreasonable distance. In the present instance it was rightly done. There was no price to be obtained at *Hamburgh*. The recent failures, though they left a market, gave no *price*; for, between a market and a price, there is a wide difference. The former signifies a possibility of sale. The latter such a one as is adequate and beneficial. Sending to *Rotterdam* obtained a price, and *that* was a sufficient reason for the measure. No *mala fides* can be imputed. The contrary appears. Had any existed, a sale at *Hamburgh* to themselves, or friendly purchasers, would have enabled *Buildemaker & Co.* to avail themselves of the *Rotterdam* price for their own benefit. The counsel opposed to us, are not aware of the consequences which a denial of this discretion might induce. Suppose at *Rotterdam* a profit of 50,000 dollars; would *Buildemaker & Co.* have been

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

AJ. BANY,
February, 1805.

D. & G. Ludlow
v.

Simond.

entitled to retain it? Yet, on the argument of an indispensable obligation to sell at *Hamburgh*, the proceeds at *Rotterdam* ought to be theirs. For, if liable to make good a loss resulting from such sale, the profit must belong to them. The fact is, that *Hamburgh* was the contemplated, but not the stipulated, port. If, then, the place of sale was not restricted, still less so was the time. Nothing but inference can be used to establish such a position, and a surety is not, with all the leaning of courts in his favour, to be discharged from the letter of his contract by mere implication. If his responsibilities are not to be increased, his exemptions are not to be multiplied. But the words of the instrument, and its positive provisions, show an expectation of a possible lapse of time in winding up the adventure, far beyond that allowed by the opposite side. It is expressly agreed, that the appellants shall have interest on their advances. Now interest never runs till after the day of payment. On the other points we think enough has been shown in the opening, to warrant the reversal of the decree appealed from.

SPENCER, J. In the discussion of this cause the counsel have rested their arguments on two principal points.

1st. Whether the court of chancery had jurisdiction of this cause?

2d. Whether the respondent, *Simond*, has, from the facts proved, been discharged from his responsibility on the contract entered into between the appellants, *Leremboure*, and himself?

I shall not enter into a particular consideration of the first question, because, it is immaterial, in the view I have taken of the subject, whether the court

of chancery had, or had not jurisdiction. I wish, however, to be explicitly understood as not subscribing to the proposition, that *that* court had cognizance of the cause on any of the grounds urged by the appellants' counsel ; and did it rest solely on that point, the strong inclination of my opinion is, that the appellants' relief, if any they are entitled to, is at law.

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

It cannot be controverted, but that *Simond* is a surety, or guarantee for the performance of *Leremboure's* contract, so far forth as respects the indorsement of a note which the latter stipulated to give *Daniel Ludlow & Co.* for the deficiency of the proceeds of the sales of the goods mentioned in the contract. He is a surety merely, without the chance of reaping any benefit from the enterprise ; he has no interest in the adventure, and does not appear to have been indemnified by any security for this gratuitous undertaking, and although it was suggested, that he might have been interested or secured, yet no facts appear in the case, to warrant those suggestions, and the court are to judge *secundum allegatu et probata*. I proceed, therefore, on the fact, that *Simond* was a surety, without any interest in the subject matter of the contract, and without any counter security.

It has been correctly urged, that sureties are favourites of courts of equity, and that those courts will not bind them, where they are not strictly bound at law. It may, in the same sense, be said, that they are favourites of courts of law ; and that there they will not be bound beyond the scope of their engagements. These maxims, if I may so call them, grow out of the consideration, that in the various transactions of life, men are liable to be called on to render

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

acts of neighbourly kindness, without any interest or expectation of reward ; that they are frequently called on to become bail, indorsors of notes, guarantees in various modes, and when, in such cases, the principal turns out to be insolvent, it becomes a question, which of two innocent parties shall sustain a loss. Both courts of equity and law will cast the responsibility on the surety, if, by the *terms* of his engagement, he has assumed it ; but neither of them will do this where he is not brought within the precise scope of his undertaking.

The authorities on this subject are very uniform ; they speak a language not to be misunderstood, and, without detaining the court by an enumeration of them, I am fully justified, by those cited, in saying, that, both in law and equity, contracts, involving the rights of sureties, will, so far as respects *them*, receive a more rigid and less liberal construction, than between the original contracting parties.

I shall not unnecessarily repeat the facts in this cause. The material ones are, that by the contract, subscribed by the respondent, it was stipulated, that *Leremboure* should put on board one or more vessels, tobacco and sugars at certain fixed prices, of the value of 40,000 dollars. That these goods should be consigned, under bills of lading, to *Buildemaker & Co.* the appellants' correspondents at *Hamburgh*, to be sold for the account and risk of *Leremboure* ; that he should insure them, and assign the policies to the appellants, who should receive from the underwriters the amount of the losses to reimburse themselves, the appellants stipulating to furnish their notes to *Leremboure* for the 40,000 dollars, payable, the one-half

at four months, the other half at six months, and if the proceeds of the shipments should exceed the amount due the appellants, they were to be answerable to *Leremboure* for the difference when in cash.

ALBANY,
February, 1804.
D. & G. Ludlow
v.
Simond.

If the policies did not furnish a mode of reimbursement, then the appellants were authorised to draw at sixty days sight on *London*, twenty days before their notes respectively became due, at the then current exchange, and to order the necessary remittances to be made by *Buildemaker & Co.* at the risk of *Leremboure*, both as to the validity of the bills, and the solvency of the house in *London*, to whom the same should be made, and should the proceeds of the sales at *Hamburgh*, so disposed of, not prove sufficient to reimburse the appellants the amount of their several notes, together with what interest might be due them on their advances, their commissions, and all other charges attending the negotiation, *Leremboure* agreed to make good the deficiency, as soon as ascertained, by giving his note to the appellants payable at 60 days, *to be indorsed by the respondent, who agreed thereto.*

The shipments were made on the 11th of *March*, and the 6th of *April*, 1799, at which time the appellants gave their notes stipulated to be given by the contract. The cargoes shipped and consigned to *Buildemaker & Co.* arrived safe in the summer of that year; previous to the arrival of the cargoes, a great change had taken place in the market at *Hamburgh*, and many failures had happened among the principal traders there. *Buildemaker & Co.* without any directions from the appellants, sent 219 hogsheads of tobacco to *Rotterdam*, where they were sold

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

in *December*, 1799, and the summer of 1800, in the name of the appellants. The proceeds of the sales were insufficient to reimburse the appellants, the amount of their notes, with interest, commissions and charges, and for that deficiency the suit below was instituted against *Leremboure* and the respondent. It appears that, after the accounts had been received from *Buildemaker & Co.* the appellants presented them to *Leremboure*, who overlooked them, and said they were right, but that, having become insolvent, and being then confined for debt, he refused to give his note for the deficiency, and both he and the respondent refused, after the time had elapsed when such note, if given, would have become payable, to pay the appellants the balance, which the appellants claim to be 24,044 dollars 82 cents.

The only proof of the price of tobacco at *Hamburgh*, is derived from the deposition of *John H. Schmidt*, who states, that the price of *Virginia* tobacco there, from the month of *October*, 1799, to the latter end of the year, was, from three and nine-pence to four shillings a pound, *Hamburgh* currency; but that he does not know the price in the summer of that year, although *Maryland* tobacco was considerably higher than *Virginia*, during that period. It would seem that the sending the tobacco to *Rotterdam* has saved those interested in the proceeds from 3 to 6,000 dollars, if the price at *Hamburgh*, in the summer of 1799, was not higher than in the fall of that year, and the year ensuing.

There is no proof in the cause, that, on account of the failures at *Hamburgh*, the tobacco was unsalea-

ble ; on the contrary, it appears that the sugars were sold, and that in *October*, 1799, tobacco was saleable.

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

From this state of facts arises the question, whether the respondent is to be holden responsible for the deficiency of the sales ? and, in my opinion, he is not responsible. The contract he has entered into, obliges him to indorse *Leremboure's* note for the deficiency of the proceeds of the sales at *Hamburgh*. The place of the sales is, in my conception, not only a condition precedent, but it enters into the substance of the contract. It may not appear, at first view, at all material where the sales were made, provided the goods were sold for the best price that could be obtained ; but it will, on examination, appear extremely important to the respondent, that the sales should have been made at *Hamburgh*, rather than *Rotterdam*. Whether, however, this be, or be not material, if *Hamburgh* was agreed by the contract to be the place of sale, then on principles, as applicable to sureties, the respondent is discharged.

That *Hamburgh* was the designated place of sale is manifest, not only from the words of the contract, but from its plain and evident meaning. The goods were consigned to *Buildemaker & Co.* to be sold ; the consignment to this house, transacting business at *Hamburgh*, a great commercial city, imports, in itself, that the sales were to be there. The insurances extending no further than to *Hamburgh*, is still more demonstrative of the sense and understanding of the parties, that they were to go no further. The want of provision in the contract for any other market, and, above all, the express terms of the contract, whereby

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

the respondent engaged to indorse *Leremboure's* note for the deficiency of the proceeds of the sales at *Hamburgh*, leave, I think, not a particle of doubt on that subject.

This case is, then, perfectly analogous to the case in 2 *Chan. Ca.* 22, where a bond was given by a principal and his surety, to pay such sum as *N. H.* a master in chancery, should report. The master agreed on, died without making a report. The chancellor determined on the principle I have stated, that the surety, not being bound at law, should not be holden in equity.

The sales not having been made at *Hamburgh*, is, I think, matter of substance. I have observed already, that the appellants gave their notes on the 11th of *March*, and 6th of *April*, 1799. The first became payable the 14th of *July*, and the last the 9th of *October*, in that year. The appellants contemplated, beyond a doubt, to meet these notes by drafts on *London*, at sixty days sight, and for that purpose *Leremboure* authorised them to draw bills, twenty days before their notes respectively became due, and to order the necessary remittances to be made by *Builde-maker & Co.* to their friends in *London*, on whom they might value to meet their drafts. From this arrangement the respondent must have contemplated, when he entered into the contract, that the cargoes thus shipped were to be sold, so as to form a fund for the payment of the bills to be drawn by the appellants, and that the term of his responsibility would not be extended beyond the last of the year 1799. Instead of this, by the transportation of the goods to *Rotterdam*, the period of his responsibility was enlarged to

the 30th of *September*, 1800, a time far beyond any ideas he could have formed from the provisions of the contract. Had it not been thus enlarged, and the goods been sold for the lowest possible price at *Hamburgh*, he might, for aught that appears, have secured himself before *Leremboure* became insolvent. As in the case of *Rees v. Berrington*, 2 *Ves. J.* 543, so here, in the language of Lord *Loughborough*, "we cannot try the cause by inquiring what mischief it may have done (*to send the goods to Rotterdam*) for that would go into a variety of speculation, upon which no sound principle could be built."

ALBANY,
February, 1803.

D. & G. Ludlow
v.

Simond.

To hold the respondent liable, notwithstanding the terms have not been complied with, on which alone his responsibility was to arise, would be substituting another contract in lieu of the one the parties have made. It is impossible to say, that a contract, agreeing to be responsible for the deficiency of the proceeds of sales at *Hamburgh*, ought to be construed to be a contract to be responsible for the deficiency of the proceeds of sales at *Rotterdam*.

It has been urged by the appellants' counsel, that *Buildemaker & Co.* were not exclusively their agents; and that they acted without their directions, in sending the goods to *Rotterdam*, and that they had, by law, a right to send them to a neighbouring market for a better price.

It will not, I trust, be contended, that had the appellants ordered the goods to *Rotterdam*, in case a higher price could have been there obtained, that, then, the respondent would have been liable. If, in that case, all responsibility would have been gone, how can it alter the case, as respects the respondent,

ALBANY,
February, 1805.

D. & G. Ludlow

v.

Simond.

by what means the goods were sent there? He had no controul over them; and if his responsibility is extended beyond the terms of his contract, however hard the case may be as regards the appellants, it would be harder as respects him. If, by law, an agent receiving a consignment of goods to sell, may send them to another market, which I am not prepared to admit, then the appellants may be chargeable with negligence in not instructing *Buildemaker & Co.* to sell at *Hamburgh*. But if, as I incline to think, they could not, as consignees, have sent their goods to another market, they would, under the facts proved in this case, be responsible to the appellants, unless they have affirmed their acts, and thus concluded themselves. "A man may," says Chief Justice *Willes*, in his reports, p.407, "in many cases, either consider another as a wrong-doer, or as a receiver of money for his use, as he thinks best, and most for his advantage." In this case, the appellants have, it appears to me, affirmed the acts of *Buildemaker & Co.* in selling the goods at *Rotterdam*, by receiving their accounts, and passing the proceeds of the sales there, to the credit of *Leremboure*. This fact appears by the accounts exhibited by the appellants. It then turns out to have been a sale at *Rotterdam*, contrary to the contract, assented to by matter *ex post facto* by the appellants, and this I consider another insuperable difficulty to their recovery.

The amount in demand, and the learned and ingenious arguments submitted to the court, have induced all the research and examination in my power to bestow. The clear and decided result is, that the respondent is discharged from his responsibility on the

contract ; and, although I perceive that the appellants have conducted themselves with perfect good faith ; that the loss is, to them, a severe misfortune, I am unwilling to restore them their losses, by inflicting an injury on a man having a perfectly legal and meritorious defence. In my opinion, therefore, the decree of the chancellor must be affirmed with costs to be taxed.

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

THOMPSON, J. This case naturally divides itself into two general subjects of inquiry. 1st. As it respects the remedy, whether, if any, it ought to be in a court of law, or in a court of equity ? 2d. As it respects the rights of the parties.

The first may be considered, in some measure, as matter of form ; the second as matter of substance ; and although it might be deemed more correct, in point of order, to determine the right before the remedy, yet, as I shall examine both questions, not knowing the course that may be pursued by other members of the court, the order of examination becomes immaterial.

There are several grounds, I think, upon which the appellants had a right to go into equity for relief.

It is undoubtedly important to the ends of justice, that the boundary between the jurisdiction of courts of law, and courts of equity, should be plainly marked, and strictly pursued. Were, indeed, the present an attempt to overleap the boundaries heretofore established, it might present a different question ; but that, I think, is not the case here. By the ancient rule, according to Lord *Coke*, 4 *Inst.* 84, the jurisdiction of the court of chancery, was confined to frauds, accidents and trusts. So in 10 *Mod. Rep.* 1.

ALBANY,
February, 1803.

D. & G. Ludlow

v.

Simond.

But that jurisdiction has been gradually extended, and *Fonblanque*, in the first volume, page 8, of his valuable treatise, observes, that the *English* courts of law are, equally with their courts of equity, chargeable with having extended their jurisdiction by the aid of fiction ; and that if courts of equity, professing to proceed upon the ground of the party being remediless at law, do take cognizance of some matters, of which courts of law would now take cognizance, they will be found originally to have derived their jurisdiction from the narrow decisions of courts of law, and having once strictly possessed it, courts of law ought not to be at liberty at pleasure to deprive them of it. The jurisdiction, he again says, page 11, exercised by courts of equity may be considered, in some cases, as assistant to, in some, concurrent with, and in others, exclusive of, the jurisdiction of courts of common law.

Matters of account form one class of cases, wherein courts of law and equity, exercise concurrent jurisdiction. *Blackstone*, 3 *Com.* 437, lays it down as extending to *all* matters of account ; and it is a subject, I think, over which the jurisdiction of a court of equity ought to receive a liberal construction, because, the mode of proceeding is more peculiarly adapted to a deliberate examination, and correct settlement. All parties in the present case, were interested in having the account stated. The result was the basis, upon which the respective rights, and responsibilities of the parties depended. The account being to be stated by the appellants themselves, cannot alter the question. The other party had a right to contest it, and the same examination might be in-

volved as if the defendants below had been called upon to account. In matters of account both parties are actors. 1 *P. W.* 363. Hence it is, that after a decree to account, a defendant may revive the suit ; because, say the authorities, in such case the defendant is considered as an actor ; for, until the account is taken, it is not known where the balance lies. Although the account, as stated, was admitted by *Leremboure*, it was not by *Simond*.

ALBANY.
February, 1803.
D. & G. Ludlow
v.
Simond.

The necessity of a discovery might originally have been the foundation of the jurisdiction of a court of chancery, in matters of account ; still I cannot discover from authorities that it is now restricted to cases of that description. *Mitford*, 111, says, that in matters of account, equity has a concurrent jurisdiction with courts of common law, in cases where no difficulty would have attended the proceeding in those courts. *S. P.* 1 *P. Will.* 251. n. A. And I can see no good reason why a trustee, who is desirous of having his accounts settled, should not be at liberty to call the *cestui que trust* into a court of equity for that purpose.

There is another ground, I think, for sustaining the bill. *Leremboure* had refused to give his note for the deficiency, and it may be *doubtful*, whether a specific performance in this respect, was not necessary for the purpose of charging *Simond*. If also, any fraud or collusion had been practised between them, it would, in a peculiar manner, be an object of chancery jurisdiction.

The transaction was complex, the remedy at law, difficult. 1 *Str.* 733. Mr. Justice *Buller*, when sitting for the Lord Chancellor, in the case of *Wey-*

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

mouth v. Boyer, 1 *Ves. J.* 424, says, "we have the authority of Lord *Hardwicke*, that if a case be doubtful, or the remedy at law difficult, he would not pronounce against the jurisdiction of this court, and the same principle has been laid down by Lord *Bathurst*." Matters of account are proper subjects for a court of equity. 1 *Atk.* 128. It does not follow, that because a court of law would give relief, that a court of equity loses the concurrent jurisdiction, which it has in matters properly cognizable there. 3 *Bro. Ch. Ca.* 224. In *Wright v. Hunter*, 5 *Ves. J.* 794, the master of the rolls says, "I would not lay it down, that because courts of law may entertain actions upon such subjects" (a case of contribution among partners) "a party may not file a bill for contribution;" for though he thought the question more proper to be tried at law, the plaintiff was very well justified in coming there, "for," he adds, "this court has never given up its jurisdiction."

Independent, however, of the foregoing considerations, I am inclined to think, the respondent comes too late with an objection to the jurisdiction of the court, he having answered, and contested the merits, the subject matter of the bill being within the jurisdiction of the court. This appears to me, to be a reasonable rule, and calculated to save expenses. It is a good general principle, that where a party objects to the jurisdiction of a court, he ought to do it at the earliest opportunity. I would not, however, be understood to extend this rule, to cases where the subject matter is not within the jurisdiction of the court. Baron *Gilbert*, in his history and practice of the court of chancery says, page 219, "where the common law

would give the same relief as a court of equity, there, if the defendant would deny the deed, and demur to the relief, the demurrer would be allowed ; but if the defendant doth not demur to the relief, the court will decree for the plaintiff on the hearing, after the deed is properly proved ; because the defendant admitted the jurisdiction by answering and putting it in issue, and not demurring." Again, page 51, where a plaintiff goes into a court of equity, for damages, which are uncertain and not to be settled but by a jury, the defendant may demur to the relief after having first answered to the damages ; because it is *alieni fori*, since the court cannot settle the damages." But this must be *ante litem contestationem* ; for if he answers and contests with the plaintiff, he can take no advantage of it at the hearing ; for he has submitted to the jurisdiction of the court, and the court will not try at law the *quantum* of damages by a feigned action, 1 *Vez.* 446. I am therefore of opinion, that the objection to the jurisdiction of the court was not well founded.

But as the result of my opinion is with the respondent, it is of little moment, as it respects the present case, whether the appellants have resorted to the proper *forum* for redress or not.

The first question presented, on this part of the case, relates to the *execution* of the contract, on the part of the appellants. It purports to have been executed in the name of *Daniel Ludlow & Co.* being the name of a firm, composed of *Daniel & Gulian Ludlow*. The signature must necessarily have been written by one only of the company, and as it is a settled rule of law, that one partner cannot

ALBANY,
February, 1805.

D. & G. Ludlow
v
Simond.

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

bind his copartner by seal, it is contended that the contract is invalid. Had the execution been by one of the firm, without the assent of the other, the objection might be well grounded; but from the testimony, the fact appears otherwise. Two witnesses testify, that they saw *Daniel Ludlow* and *Gulian Ludlow*, execute the contract. It is said, however, that this testimony is equivocal; that the witnesses intended probably to be understood, that they executed it in the usual and ordinary mode, in the course of the partnership concerns, by one only of the company. This inference appears to me, not warranted by the language of the witnesses. They speak of the parties individually, not as a company; and had not *Daniel Ludlow* and *Gulian Ludlow* both been present, and assented to the execution, the language of the witnesses, doubtless would have been, that they saw the contract executed by the one, who subscribed the name of the company. The interrogatory part to the witnesses was, "did you or not, see *Daniel Ludlow* and *Gulian Ludlow* execute the deed?" Taking it for granted, from the evidence, that *Daniel* and *Gulian* were both present, and assented to the execution, and probably both acknowledged the seal, I think the contract well executed, according to the principles settled in *Lord Lovelace's Case*, *Sir W. Jones*, 268, and *Ball v. Dunsterville*, 4 D. & E. 314.

I shall next examine the character which the respondent, *Simond*, assumes in this contract. This becomes necessary; because, from the whole current of authorities, it is manifest, that where a party is charged as surety, he has a right to avail himself of a strict

and literal construction of his contract, in order to exonerate himself from responsibility.

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

In examining this question, we have principally to resort to the contract itself. In expounding it, the cardinal rule is, that the intention of the parties ought to be sought after, and carried into effect, and to govern the construction, where, from the instrument itself, that intention can be discovered. In viewing the general nature and object of this contract, and the parties who were to be beneficially interested in the speculation, I can consider *Simond* in no other point of light, than in the character of a mere surety. It is the essence of a partnership transaction, that each partner should be entitled to the gain, as well as exposed to the loss resulting from the concern. That was not the case here, for it is expressly provided, that if the proceeds of the several shipments, shall exceed the amount due *Daniel Ludlow & Co.* it shall be paid to *Leremboure*. Every feature of the contract shows, that *Simond* was not concerned in interest. The shipments were to be made by *Leremboure*. The notes to purchase the cargoes were to be furnished to them. The sales were to be made on his account, and at his risk. The policies of insurance were in his name, and by him to be assigned. The loss, if any, at the winding up of the speculation, to be borne by him; for the contract expressly states, that "*A. M. Leremboure* agrees to to make good the deficiency when ascertained." The mode of doing it, however, was by giving his note, with *Simond's* indorsement. The appellants, in their bill, pray, "that the accounts between them, " and the said *Leremboure*, arising under the said

ALBANY.
February, 1805.

D. & G. Ludlow
v.
Simond.

agreement, may be taken and stated." Not that the accounts between them, and the said *Leremboure* and *Simond*, might be taken and stated, which would have been the prayer, had they conceived *Simond* beneficially concerned. In addition to this, *Simond*, in his answer, under oath, solemnly denies having any interest in the contract, and this is not contradicted, or in any manner rebutted, by the appellants.

Simond, then, being considered a mere surety, it becomes necessary, in order to determine his liability, further to examine the contract, and see what was to be done by the parties respectively, for the purpose of determining, how far each one has complied with his obligation imposed by the contract, and the law applicable to this case. There is no necessity, however, of minutely examining all the stipulations, contained in the agreement; no breach of them is alleged on either side. *Leremboure*, on his part, purchased and shipped the cargoes pursuant to his contract; caused them to be insured, and duly assigned the policies to the *Ludlows*. The *Ludlows*, on their part, furnished *Leremboure* with the means of purchasing these cargoes, and consigned the bills of lading, which were given to them, to *Buildemaker & Co.* their correspondents at *Hamburgh*, according to the stipulations of the said agreement. But the principal controversy relates to the time and place of selling these shipments; and whether, in that respect, there has been any *laches*, on the part of the appellants, so as to take away their right of calling on the surety to make good the loss. Here I would premise, as it was made a topic of argument by the counsel, that I see no ground for alleging fraud or

collusion, either against the complainants, or the respondent. But the case presents an honest struggle, to shift the burthen of a very heavy loss.

ALBANY,
February, 1805.

D. & G. Ludlow
v.

Simond

There is no time expressly limited by the contract, within which the shipments were to be disposed of; but from the other provisions in the agreement, I think the intention of the parties in that respect, may easily be discovered. It is fairly to be presumed, that the complainants did not intend to advance cash, for the purchase of these cargoes; but only to lend their names and credit to *Leremboure*, for that purpose. The first shipment was made on the 11th of *March*, 1799. The notes furnished by the complainants of that date, payable in six months, according to the contract, would fall due the 14th of *September*, and those payable in four months, would fall due the 14th of *July*. The second shipment was on the sixth of *April*, 1799. The notes furnished of that date, payable in four months, would fall due the 9th of *August*. The amount of the complainants notes, furnished to *Leremboure*, was 36,431 dollars 88 cents, which fell due in the proportion, and at the times following, to wit: 2,697 dollars 99 cents, on the 14th of *July*; 13,733 dollars 89 cents, on the 9th of *August*, and 20,000 dollars on the 14th of *September*. According to the usual course of a voyage, between *New-York* and *Hamburgh*, calculating on a ready market, the proceeds of these shipments would have been received in season to answer the complainants engagements. This is fortified by the appellants' own showing, in the account current annexed to their bill of complaint. From that it appears, that they must, as early at least as the 16th of *July*, have received the certificate of the sugar's having been landed at

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

Hamburgh, which was necessary to entitle them to the drawback. The sugar was shipped on the 6th of *April*; from that to the 16th of *July*, is but little more than three months. The appellants' notes were payable at 4 and 6 months, making an allowance for unforeseen delay. Hence I think it reasonable to conclude, that the appellants calculated to meet the payment of their notes, with the proceeds of these shipments, and that *Simond*, the surety, probably made the same calculation. In case *Daniel Ludlow & Co.* should not be reimbursed by the policies of insurance, they were authorised to draw for that purpose at sixty days sight on *London*, twenty days before their notes respectively became due. According to these *data*, the last draft might have been made on the 24th of *August*; the answer to which, making very liberal allowances, would, probably, have been received here as early as *December*, at which time *Simond* had a right to calculate that the speculation would have been wound up, and the result of his responsibility known.

The contract, I think, carries stronger internal evidence with respect to the place, than with respect to the time of sale. There can be but little doubt, but that the contemplated place of sale was at *Hamburgh*. The appellants stipulate to make the consignment to their correspondent at *Hamburgh*. That part of the contract providing for the deficiency, declares, that "should the proceeds of the sale at *Hamburgh*, not prove sufficient," &c. The vessel sailed for *Hamburgh*, and the insurance was for the same place. The last is a strong circumstance, showing the understanding of the parties, with respect to the place; because, the policies were to be assigned to the appel-

lants as security, which would altogether have failed, had a loss happened after the vessel left *Hamburgh*, on a voyage to another market.

ALBANY,
February, 1803.
D. & G. Ludlow
v.
Simond.

Another question for examination is, the relation in which *Buildemaker & Co.* must be considered as standing to the respective parties.

The object of the appellants manifestly was, to have the disposition of these shipments, and the proceeds completely under their controul and management.— They themselves might be considered as trustees for *Leremboure*, with a *lien* upon the property, for their advances and commissions. It would not, however, have been in the power of *Leremboure* to have called the property out of their hands, or counteracted their orders, until such *lien* had been discharged. There is nothing in the transaction showing that *Buildemaker & Co.* knew any other persons than the appellants, were interested in the shipments. The bills of lading were in their names. The consignment made by them. They to order with respect to the remittances; and, in short, to have the uncontrouled direction for the purpose of reimbursing themselves. Under such circumstances, I can conceive *Buildemaker & Co.* in no other light than as the immediate agents of the appellants. It would be incongruous to consider them the agents of *Leremboure*, and still he to have had no controul over them; and to have permitted him to have had any controul, might have defeated the *Ludlows'* security in some measure. But admitting *Buildemaker & Co.* to have been the joint agents of the appellants and *Leremboure*, it cannot affect the rights of *Simond*. His liability could not be prolonged or increased without his assent.

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

In what respects, then, has there been a variance in the execution of this contract, from what may reasonably be supposed to have been the understanding and intention of the parties? I think there has been a deviation both with respect to time and place. The final winding-up of the speculation has been prolonged from some time in *December*, 1799, to *September*, 1800; and the sales of the tobacco were at *Rotterdam* instead of *Hamburg*. The appellants having the controul over this property, in the characters of trustees for *Leremboure*, it was their duty to have made use of more diligence in the disposition of it; or if, from a change of circumstances at *Hamburg*, any embarrassments were thrown in the way, *Leremboure*, and his surety, ought to have been apprised of it. The forbearance of a trustee, in not doing what it was his office to have done, shall, in no sort, prejudice the *cestui que trust*, since, at that rate, it would be in the power of trustees, either by not doing, or by delaying to do their duty, to affect the rights of other persons. 3 *P. Will.* 215.* It is not reasonable to suppose the appellants were ignorant of the conduct of *Buildemaker & Co.* in sending the tobacco to *Rotterdam*. They had not been reimbursed for their advances; the proceeds of the tobacco, as well as the sugar were to make the fund to which they were, in the first instance, to look for reimbursement. In addition to this, the account current, annexed to the appellants' bill, shows, I think conclusively, that they must have been apprised of it. They continue drawing, at different times, on *Buildemaker & Co.* until the 13th of *August*, 1799. They then stop, and no further draft is made until *Septem-*

* *Lechmere v.*
Earl of Carlisle.

ber, 1800. Why this delay? They were not reimbursed; they must have known the fund, first to be resorted to for that purpose, was not exhausted, or they would have called on *Leremboure* and *Simond* for the deficiency. They wait, however, for one whole year, and then draw upon *Buildemaker & Co.* for the proceeds of the tobacco. By this, I think, they affirm the conduct of *Buildemaker & Co.* in sending the tobacco to *Rotterdam*, if it was unauthorised in the first instance. *Willes*, 407. It is unnecessary here to say, what ought to be the decision as between *Ludlows* and *Buildemaker & Co.* or between *Ludlows* and *Leremboure*. It appears to me, however, to be allowing agents a very considerable latitude of discretion to justify so material an alteration of the destination of a cargo, as from *Hamburg* to *Rotterdam*; from a neutral, to a belligerent port. Yet, where agents act in good faith, a very liberal construction ought to be given to their conduct. Very different rules prevail when the rights of sureties are involved; as against a surety the contract cannot be carried beyond the strict letter of it. 2 *D. & E.* 370. A party cannot oblige a surety to remain such, contrary to his consent, longer than the time first bargained for. 2 *Bro. Ch. Rep.* 582, 3. Delay granted to the principal will discharge the surety. 2 *Ves. J.* 542. The engagement of *Simond* was definite, to wit, to indorse *Leremboure's* note for the deficiency of the proceeds of the shipments to reimburse *Ludlows*. This deficiency, however, to be ascertained, in the manner and within the time prescribed by the contract. This *Simond* had a right to demand. In the case of *Wright v. Russel*, 3 *Wils.* 359, the court

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

said, "a surety ought not to be bound beyond the scope of his engagement. That courts of equity are favourable to sureties; for, where they are not strictly bound at law, a court of equity will not bind them." This doctrine was recognized, and very much approved of, by Lord *Kenyon*, in the case of *Myers v. Edge*, 7 D. & E. 256. Where any act has been done by the obligee, that may injure the surety, equity will discharge him from his liability. 4 Ves. J. 833. In the present case, the appellants, by prolonging the winding-up of this contract, exposed the surety to greater hazards, among which the insolvency of *Le-remboure* was no inconsiderable one, as the result has shown. The case of *Simpson and Field*, 2 Ch. Ca. 22, is a strong one to show the rigid construction adopted by courts to protect sureties, and also that equity will not bind them farther than they would be bound at law. The case was shortly as follows: the defendant was bound, as surety, in a recognizance conditioned to pay what should be reported by *N. H.* a master named in the condition. The master died before the report was made, and, by the strict letter of the condition, the defendant was not suable at law, because the report was not made by the master named, but by another. The Lord Chancellor dismissed the bill, saying, the party is but a surety, and not bound at law. The same principle we find recognized in the cases of *Ratcliff v. James*, 1 Vern. 196, and *Sheffield v. Lord Castleton*, 2 Vern. 393, and numerous others that might be cited.

If the view which I have taken of the contract be correct, and the deduction made be warranted by the case, the respondent stands protected by a host of authori-

ties. However honest and upright the conduct of the appellants may have been, they are chargeable with such a deviation from the contract, and such a want of due diligence in winding up the speculation, as will, in judgment of law, exonerate the surety. I am, therefore, of opinion, that the decree of the court of chancery ought to be affirmed.

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

KENT, Ch. J. In the discussion of this cause, two leading questions have been raised, both of which have been very elaborately and ably considered by counsel. The one question relates to the mode of seeking redress, and the other to the merits of the controversy. It is necessary that I should give each of them an examination, and this I shall do in the order in which they are stated.

The first question then is, whether the court below had jurisdiction of the cause?

I incline to the opinion, that the court had jurisdiction; 1st. Because matters of account were involved. 2d. Because the remedy, at law, was, at least, doubtful. 3d. Because the defendant, instead of demurring to the bill, submitted to the jurisdiction by putting in an answer to the merits.

The bill stated, at large, the contract between the appellants and *Leremboure* and *Simond*, and the history of the commercial adventure which arose out of that contract. It then stated, that a considerable loss happened on the sales abroad, and that the accounts, relative to the transaction, were presented to *Leremboure*, who acknowledged them to be just, but refused to give his note as stipulated by the agreement, and that both he and *Simond* refused to pay to the appellants the balance due them on the contract. The bill

ALBANY,
February, 1805.

D. & G. Ludlow
v.

Simond.

further stated, that difficulties would attend their proceeding at law, and prayed that the accounts respecting the transaction might be taken and stated, and the balance paid.

These accounts embraced the whole process of the adventure, from its commencement to its conclusion, and, consequently, consisted of a variety of charges and credits. As, then, one material part of the cause depended on a settlement of accounts, I think it came properly within the cognizance of the court. Chancery has a concurrent jurisdiction with the courts of law in all matters of account. Whether this jurisdiction originally arose from the necessity of obtaining a discovery by the oath of the defendant, or, in order to prevent a multiplicity of suits, is, perhaps, not now material to inquire, since it has become well established in cases where that necessity does not exist, and where no difficulty would attend the remedy at law. *Mitf. Treatise*, 109, 110, 111. *3 Black. Com.* 437. The cognizance of all causes that lie in account, does, undoubtedly, give a very broad jurisdiction to the court of chancery, but the exercise of this jurisdiction has been found in practice so convenient and salutary, that it has long since, by general consent, rendered obsolete the common law remedy by a writ of account; and, although our statute prescribes minutely the mode of proceeding by that writ, I doubt whether there ever was an instance of such an action having been prosecuted to effect in this state. The settlement of accounts, if they are in any degree long or complex, is improper, if not impracticable for a jury. The statute, therefore, in the writ of account, provides, that the accounts shall be

submitted to auditors; and, indeed, when questions of account arise at law, in the common action of *assumpsit*, they are pretty generally taken from a jury, and submitted by the court to referees, which the courts are authorised to do, with or without the consent of the parties.

ALBANY,
February, 1804

D. & G. Ludlow
v.
Simond.

I know not of any rule limiting the cognizance of the court of chancery to one species of accounts more than another; or to matters of accounts against persons in any particular relation. Its jurisdiction extends to all matters of account between individuals, in whatever relation they may stand to each other. In this it has no more than a concurrent jurisdiction with the courts of law; for the writ of account at law, is given by our statute, 1 *Rev. Laws*, 94, in all cases where one person is liable to account to another as guardian, bailiff, receiver, or otherwise, and this renders the writ more extensive than it was under the English law.

But it was objected upon the argument, that the appellants were in the light of factors or trustees coming into court to have their own accounts stated, and allowed against their principal. This, however, they may well do. In bills to account, both parties are considered as actors, or plaintiffs, and the defendant has the same advantage as if he had himself instituted the suit. *Done's case*, 1 *P. Will.* 263. *Kent v. Kent*, *Prec. in Ch.* 197. A trustee may go into Chancery to have an allowance made against his *cestui que trust*, out of trust monies in his hands. Of this we have an instance in the case of *Gould v. Fleetwood*, 3 *P. Will.* 251 n. (A). Guardians of great estates, in England, are said to pass their accounts yearly in the court of chancery, and this is recom-

ALBANY,
February, 1805.

D. & G. Ludlow
v.

Simond.

mended in *Wood's Inst.* 73, as a 'safe way to justify themselves, when the minor, at full age, shall call them to a general account.

Nor is it necessary that the responsibility of the defendant should be established before you can file a bill for an account. In most cases that responsibility, as well as the stating of the account, will be a point for litigation. It is sufficient that the cause will involve an account in case of the liability of the defendant. Both questions must be more or less connected together in every case; especially as to the extent of the engagement, and how far it will apply in particular instances.

It was said, however, that there were no accounts to state and settle in this cause, for the bill charges that *Leremboure* had admitted the accounts to be just. But the answer of *Leremboure* declares, he admitted them no further than as to the correctness of the calculations; and if he had, his admissions could not have concluded *Simond*, who would be entitled to have the accounts reliquidated, and the deficiency stated, before the court would oblige him to perform his part of the contract.

For these reasons, I think the suit below was properly instituted, and I should regret exceedingly, that any opinion which might be given by this court, should tend to embarrass the benign and well settled jurisdiction of chancery, in the unlimited cognizance of accounts.

{ Another ground upon which the bill might be sustainable is, that the remedy at law was, at least, doubtful. This has been repeatedly held as sufficient to give the court of chancery jurisdiction. *Billon v. Hyde*, 1 Atk. 128. 1 Vez. 331, *Burrows v. Jemimo*.

2 *Stra.* 733. 1 *Ves. J.* 424.* The contract is susceptible of two constructions, upon one of which there was clearly no remedy at law. If we take the contract according to its grammatical construction, *Simond* was bound only to indorse the note that *Leremboure* should give for the deficiency, and the giving the note was a condition precedent to the obligation of *Simond*. It may be said, however, and that too with great force of argument, that unless *Simond* was bound that *Leremboure* should give the note, as well as that he should indorse it, the security intended by the contract, would in a great degree vanish. If we assume the first construction, there would be no remedy for the appellants, without the aid of the court of chancery, for a suit at law would not lie for not indorsing a note which was never drawn. In such a case, the assistance of chancery would become essential, to compel the making of the note, or to reach the case of fraud or collusion between *Leremboure* and *Simond*, in not giving the note. The uncertainty, therefore, and the difficulty of an adequate legal remedy, was a sufficient reason for sustaining the bill.

It may be, also, a matter of doubt whether the contract was valid in its execution, as a sealed instrument or specialty. The proof indeed is, that the witnesses saw the appellants execute the contract, and if we are to understand them as meaning that both the appellants were actually present, and united in executing it, it was a good execution; for several persons may enter into an obligation and bind themselves by one seal. Lord *Lovelace's case*, *Sir W. Jones*, 268. *Ball v. Dunsterville*, 4 D. & E. 313.— But it may be well doubted whether the witnesses

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

* *Wt. n. w. v.*
Boyer.

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

meant any thing more than that the appellants executed the deed, in the usual mercantile way, by one of them doing it in the name of the firm; for the appellants state in their bill, that they, or one of them, executed it, and that they supposed such execution to be unexceptionable. If the fact really was, that only one of the appellants executed the contract, it was not a good execution at law, and it was necessary to resort to equity, to try how far that informality in the execution might be corrected, as it was clearly founded in mistake. *Sheffield v. Lord Castleton and Wife*, 2 Vern, 393. Chancery would not help a defective execution of a contract against a surety. *Crosby v. Middleton*, 3 Ch. Rep. 53, & *Prec. Chan.* 309, *contra*, from whence, in 1 Fonb. 37, the point is considered as doubtful.

But admitting these grounds not to have been sufficient, in the first instance, to have sustained the bill, the respondent came too late to object to the jurisdiction of the court, after he had put in his answer to the merits of the cause. By answering in chief, instead of demurring, he submitted his defence to the cognizance of the court; and equity will, and ought, in such cases, to retain the cause, provided the court be competent to grant relief, and has jurisdiction of the subject matter, as it manifestly had in this case, the controversy being upon a matter of personal contract, and of account. *Billon v. Hyde*, 1 Atk. 128. 1 Vez. 331. 3 Bro. Pa. Ca. 525. *Mitford passim*. *Gilbert's Treatise on Chan.* 51, 3. 219, 220, 1. *Penn v. Lord Baltimore*, 1 Vez. 446, 7. This last reason why the cause was sustainable in the court below, appears to me, to be supported on the firmest basis, both from the reason of the thing, and the weight of authorities.

Having thus disposed of these preliminary or technical questions, as to the jurisdiction of the court, I proceed, secondly, to examine the merits of the case.

ALBANY,
February, 1805.
D. & G. Ludlow
v.
Simond.

To perceive that *Simond* had no beneficial interest in the concern, and was but a mere naked surety for the performance of a specific act, requires only a bare perusal of the contract. The formal beginning and conclusion of the contract, do, indeed, seem to carry the agreement of the parties to the whole instrument; but we must examine the body and the scope of the agreement, to judge of its meaning and effect. On doing this, we shall immediately perceive, that the agreement of each party is to have reference only to such particular parts of the contract, as apply to him; *reddendo singula, singulis*; and as *Simond* was only a surety, it becomes important to consider and understand well, the principles of law, which are applicable to him in that character.

It is a well settled rule, both at law, and in equity, that a surety is not to be held beyond the precise terms of his contract, and, except in certain cases of accident, mistake, or fraud, a court of equity will never lend its aid to fix a surety beyond what he is fairly bound to, at law. *Underwood v. Stoney*, 1 Ch. Ca. 77. 1 Eq. Abr. 93. K. pl. 2. 6. *Skip v. Huey*, 3 Atk. 91. *Crosby v. Middleton*, Prec. Ch. 309, are cases where chancery has said it would fix a surety for mistake or fraud. *Wright v. Russel*, 3 Wils. 530. *Lord Arlington v. Merricke*, 2 Saund. 411. *Myers v. Edge*, 7 D. & E. 254. *Stratton v. Rastall*, 2 D. & E. 370. *Simpson v. Field*, 2 Ca. Ch. 22. *Ratcliffe v. Graves*, 1 Vern. 196. *Nisbet v. Smith*, 2 Bro. Ch. Rep. 579. *Rees v. Berrington*, 2 Ves. J. 540. *Law v. E. In.*

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

Comp. 4 Ves. J. 833, are all cases in favour of sureties. This rule is founded on the most cogent and salutary principles of public policy and justice. In the complicated transactions of civil life, the aid of one friend to another, in the character of surety or bail, becomes requisite at every step. Without these constant acts of mutual kindness and assistance, the course of business and commerce would be prodigiously impeded and disturbed. It becomes, then, excessively important to have the rule established, that a surety is never to be implicated, beyond his specific engagement. Calculating upon the exact extent of that engagement, and having no interest or concern in the subject matter for which he is surety, he is not to be supposed to bestow his attention to the transaction, and is only to be prepared to meet the contingency, when it shall arise, in the time and mode prescribed by his contract. The creditor has no right to increase *his* risk, without his consent; and cannot, therefore, vary the original contract, for that might vary the risk.

In the present case, the respondent agrees to indorse a note for *Leremboure*; but that note was only to be required upon the happening of a certain event. It was not *any* note that was to be given and indorsed; but it was *a* note to arise on the deficiency of the proceeds of certain sales at *Hamburgh*, and it was to be given to complete a reimbursement, which the appellants were first to seek for, by other ways and means, precisely defined. The contract provided, with a studied minuteness, the several modes by which the appellants were to seek a reimbursement. They were first to resort to the policies of insurance,

made to cover the shipments to *Hamburgh*, and which policies were to be assigned to them. But this means could only be resorted to in case of loss on the voyage; and there was no such loss, for the goods arrived safe at the port of destination. "Should this mode of reimbursement not take place," (to use the words of the contract,) the appellants were then authorised to draw, at 60 days sight, on *London*, and that too, 20 days before their notes respectively became due, and to order the necessary remittances to be made by *Buildemaker & Co.* to meet their drafts. These drafts and orders were, of course then, all to be made and completed by the 22d of *Aug.* 1799, which would be 20 days before the last of the notes became due; and, allowing the ordinary passage to *London*, the payment of the last bills there, would have been to be made by the 1st of *December*, 1799. This was the second mode of reimbursement, provided for by the contract. But should the proceeds of the sales at *Hamburgh*, "so disposed of," to again adopt the terms of the contract, not prove sufficient to reimburse the appellants, *Leremboure* was to make good the deficiency, as soon as ascertained, by a note, at 60 days, to be indorsed by *Simond*. This was the last and final mode of reimbursement, and upon which the present controversy has arisen. The returns from *London*, of the result of the proceeds of the sales at *Hamburgh*, "so disposed of," would have arrived at *New-York*, in the ordinary course of transmission, by the middle of *January*, 1800, and this was the ultimate time which resulted from the terms of the contract, for the completion of the speculation, and which was to determine the extent of the responsibility of *Simond*. The calculation, as to the time when *Si-*

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

mond was to be ultimately called upon, is to be deduced from the contract, with almost as much precision and certainty, as if the contract had expressly fixed it at *January*, 1800.

The property in question, was intended to answer the bills on *London*, and reimburse the appellants. The remittances, therefore, were to be made from *Hamburgh*, by a certain time, because they were to meet a precise object. Both the appellants and *Leremboure*, must have contemplated the sales at *Hamburgh*, to be made in the summer of 1799, in order to guard against the immense loss in damages that might result, if the remittances were not met in *London*, by the 1st of *December*, 1799, to save the bills from being protested.

The place of sale was clearly designated by the contract. The property was to be consigned to *Buildemaker & Co.* at *Hamburgh*, to be sold. The property was insured for *Hamburgh*. The appellants to order the remittances to be made by *Buildemaker & Co.* to *London*, and these orders were all to be issued by the 22d of *August*, 1799. The remittances were to be made at the risk of *Leremboure*, and the contract further adds, that, should the proceeds of the sales at *Hamburgh* be insufficient, &c. There was no cover provided for risk in transmitting the property to any other place. The ultimate hazard was to terminate there. From all these facts and circumstances, I consider the intent of the contract to be unequivocal and certain, that the property was to be disposed of at *Hamburgh*. A place of sale *intended* by a contract, is equivalent to a place of sale *stipulated* by a contract. What, indeed, are stipulations in

agreements, if they are not acts intended and contemplated by the parties ?

This being the contract, let us next see with what precision it was executed. Instead of winding up the speculation, and ascertaining the deficiency, in *January*, 1800, it was not done till *October*, 1800; and instead of having the tobacco sold at *Hamburgh*, in the summer of 1799, by *Buildemaker & Co.* it was sent over land, a distance of near 250 miles, to *Rotterdam*; most of it not sold till *July*, 1800, and that too by a different house, *Roquette Buildemaker & Co.* What reasons are given for this wide departure from the terms of the contract ? It is stated and admitted, that, previous to the arrival of the cargoes at *Hamburgh*, and which must have been early in *June*, 1799, many failures had happened among the principal traders there, but the effect that this calamity had upon the market or the price, is not ascertained, and we are left altogether to conjecture.— There is no testimony as to the price of tobacco there, during the summer. It is only proven, that from the month of *October*, to the end of the year, the price of *Virginia* tobacco was from 3s. 4d. to 4s. *Hamburgh* currency, *per lb.* and so continued in 1800; while, for the same period, the price of *Maryland* tobacco was considerably higher. I am willing to admit, that *Buildemaker & Co.* might have sent the goods to a different market in cases of necessity; such as those resulting from fire, pestilence, or the invasion of an enemy. But this necessity must be clearly made out, and a strong case shown to justify a factor in changing the place of sale, and the agents who are to conduct it. He, by this, exposes the property to unfore-

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

seen accidents, and, perhaps, disconcerts all the arrangements of his principal. No sufficient cause appears, in the present case, for the conduct of the agents. Notwithstanding these mercantile failures, there was no complaint of a want of market or price, as to the sugars; and it ought not to have been left to inference only, but it should have been made affirmatively to appear, that the tobacco could not have been sold during the summer of 1799. If to seek a better market was discreet, was it requisite to go as far as *Rotterdam*, and pass by many large commercial neutral sea-ports and cities, that were much nearer? But this was not all. The property was changed from a neutral to a belligerent port, at the very time too, when *Holland* was perishing under the rapacity of *French* armies, and the scourge of the *Russian* and *British* invasion. This was exposing the property to a new, extraordinary, and, in my opinion, a most unwarrantable hazard. In addition to the usual perils of a long transportation, and new agents, it was exposing it to the very extremity of war-risks.

Admitting, which I am willing to do, that *Buildemaker & Co.* acted with good faith in this transaction, and that the appellants never gave any directions as to the change of the place of sale; have not the latter done what, in judgment of law, is equivalent thereto? It was a point very much litigated upon the argument, whether *Buildemaker & Co.* were the exclusive agents of the appellants, or only the concurrent agents of them and *Leremboure*. It does not appear to me, to be very material to determine this question, either one way or the other; for, it is sufficient they were not the agents of *Simond*. He had

no agency or beneficial concern in the shipment, and no agreement, even between the appellants and *Leremboure*, to send the property to *Rotterdam*, could have bound him. The contract, as to him, could not have been varied without his consent. But, I think, it results from the case, that the appellants have made the act of *Buildemaker & Co.* their own. They were to draw bills on *London*, in the summer of 1799, and to order the proceeds of the *Hamburgh* sales to be remitted there. In this mode, and at this time, they were to seek a reimbursement, and it appears, from the account annexed to the bill, that, during *that* summer, they drew on their agents for 30,777 dollars 90 cents. It is to be presumed, that they were apprized very early of the determination of their agents to send the goods to *Rotterdam*; for, after the 13th of *August*, 1799, they discontinued their drafts, and, from that time, they remained perfectly silent and passive, waiting for the returns of the *Rotterdam* sales, until the 18th of *September*, 1800, when they receive and credit *Leremboure* with the amount of them, and then, for the first time, call on him for the deficiency. This conduct amounted to an affirmance of the acts of *Buildemaker & Co.*; for, if an agent steps beyond his authority, the principal may, at his election, and as best suits his convenience, either consider him as a wrong-doer, or he may affirm his act, and consider him as a receiver of money for his use. *Willes' Rep.* 407. This latter course the appellants thought proper to pursue, and, therefore, the sound, well known rule of law applies to them, that the subsequent affirmance, by the principal, of the unauthorised act of the agent, is equivalent to an original order. This

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

ALBANY,
February, 1805.

D. & G. Ludlow
v.
Simond.

conclusion appears to me to result necessarily from the facts. *Buildemaker & Co.* were, generally speaking, the exclusive agents of the appellants, in respect to this mercantile adventure, though, perhaps, under certain circumstances, *Leremboure*, the *cestui que trust*, might have interfered. But it is not requisite, in the view which I take of the subject, to maintain absolutely this exclusive agency. It is sufficient to say, that the transaction was so conducted, that *Buildemaker & Co.* became, in fact, the actual and effectual agents of the appellants, and being so, the appellants, not only, in the first instance, directed, but, in the last instance, affirmed their conduct, by a strict acquiescence, for one year, in the sending of the goods to *Rotterdam*, and then by expressly receiving, at their hands, the proceeds of the *Rotterdam* sales. If the appellants intended to have pursued strictly the course of their contract, they ought, so soon as they were informed that the tobacco was sent off, and that the proceeds of the *Hamburgh* sales were insufficient, to have then called on *Leremboure* with the ascertained deficiency, demanded their note, and left *him* to have pursued, at his own risk, the property, or the agent who had misused it. They would *then* have been entitled to their note, indorsed by *Simond*, for the deficiency, however great it might have been. It is their sanction of the conduct of *Buildemaker & Co.* that makes it their own. By that means they have so essentially varied the terms of the contract, that the surety is no longer holden.

The case would not be altered, were it really true (of which, however, we have not the requisite proof) that the sending the tobacco to *Rotterdam* produced

a better price. This would be a mere accidental result. It might have been otherwise. But it is the *principle* in the transaction, the variation of the contract, that discharges the surety. This principle is stable and uniform, not depending upon the fluctuations of markets. Nor will it do to say, that *Simond* shall have credit according to the best price at *Hamburgh* in 1799, and be holden only for the deficiency. The principle that releases a surety, under such circumstances, is not to be modified by such a concession. It appears that *Leremboure* was insolvent in *October*, 1800; but how long antecedently he had been so, does not appear. If the contract had been strictly pursued, it is possible that the surety might have indemnified himself, as early as the beginning of the year 1800. The variation of the contract may have thrown him off his guard, and prevented him from holding fast any fund in his possession, or from taking other precautions to indemnify himself, until it became too late to do it with success. As we cannot know or anticipate the possible injuries that may ensue from a departure from the terms of the contract, it is proper that the court should lay down, and adhere to, a general rule on the subject.

For these reasons I am of opinion, that the decree of the court below be affirmed with costs.

Per totam curiam.

Judgment of affirmance.

ALBANY,
February, 1805.

D. & G. Ludlow
v.

Simond

ALBANY,
February, 1805.

Bush

v.

Livingston and
Townsend.

John Bush, Appellant,
against

Peter W. Livingston, and John Townsend,
Respondents.

A security made on a good, and *bona fide* consideration, cannot be impeached on account of a usurious transfer. Therefore, where a mortgage is assigned to a third person, who pays what is due on it to the mortgagee, the mortgagor cannot avoid it in the hands of that third person on account of an agreement to repay him a sum, exceeding the money paid, and legal interest, though the excess will be denied, and only the money actually paid, and lawful interest allowed. If a cause come before this court on appeal from an interlocutory order, and the whole merits of the case appear, the court will make a final decree, and direct the chancellor to carry it into effect.

FROM the pleadings, and cases delivered in this cause, the facts appeared to be these.

Livingston, in the years of '96 and '98, borrowed of one *Evertson*, the two several sums of 3,000 dollars and 2,793 dollars, on mortgage. The day of redemption having elapsed, and *Livingston* being further indebted to *Evertson*, for interest and some other matters, amounting, with the above principal sums, to 6,222 dollars, *Evertson* demanded payment. In consequence of this, *Livingston* arranged with him to pay 5,600 dollars cash, and give his notes for the residue. This being acceded to, *Livingston* applied to *Bush* to advance the 5,600 dollars to *Evertson*, agreeing to repay it in 90 days, with a *douceur* of 400 dollars; the money thus advanced, and the *douceur* to be secured by an assignment from *Evertson* of the two mortgages, and their concomitant bonds; each of the several assignments to express 3,000 dollars to be the consideration paid by *Bush* to *Evertson*. These transactions being thus concluded, *Bush* gave to *Livingston* the following receipt: "Received this day, an assignment of one mortgage, bearing date the 4th day of *June*, 1796, given by *P. W. Livingston* to *Nicholas Evertson*, and of another, bearing date the 30th day of *January*, 1798, also given by the said *Livingston* to said *Evertson*, toge-

ther with the bonds accompanying the same, which bonds and mortgages I acknowledge myself to hold, of the said *Livingston*, as security for the payment of six thousand dollars, in ninety days from this date; and upon payment of said sum, I hereby agree with said, *Livingston* to procure the said bonds and mortgages to be cancelled. In witness, &c. 22d *July*, 1799,

JOHN BUSH."

ALBANY,
February, 1805.

Bush
v.
*Livingston and
Townsend.*

The money not being paid, *Bush*, in *September*, 1800, filed his bill to foreclose, against *Livingston* and several of his judgment creditors, stating, among other things, "that *Peter W. Livingston* applied to the said *John Bush*, and requested him to lend the said *Peter W. Livingston* a sum of money, and offered to secure the repayment thereof by procuring an assignment from the said *Nicholas Evertson* to the said *John Bush*, of the said bonds and mortgages." The bill also set forth, that the assignments of the mortgages were made "for a full and valuable consideration, paid by the said *John Bush* to the said *Peter W. Livingston*, and by him to the said *Nicholas Evertson*, as by the said assignments, indorsed on the said indentures of mortgage, and ready to be produced as the court shall direct, and to which he for greater certainty refers himself, may appear."

Livingston put in his answer, and after admitting the mortgages, demand of payment by *Evertson*, and his own inability, added, that "being urged by his necessities, he applied to the complainant, *John Bush*, to borrow a sum of money, to pay off the said bonds and mortgages, or the greater part thereof, whereupon the said *John Bush*, taking advantage of his necessities, offered to loan him 5,600 dollars for ninety

ALBANY,
February, 1805.

Bush
v.
Livingston and
Townsend.

days, if he, this defendant, would agree to repay the same at the expiration of that time, and to allow and pay, for the use and forbearance thereof for that time, four hundred dollars, to which this defendant, under the pressure of his necessities, agreed." The answer then went on, and set forth the contract for the advance, in the manner already stated, averring the *dou-
ceur* of 400 dollars to exceed the legal interest, for the ninety days, of the sum lent; that, therefore, the *secu-
rities were void in the hands of the appellant*, and praying to have them decreed to be given up to be cancelled.

In support of the answer, *Livingston* examined *Evertson* as a witness, and he deposed, that the sum paid to him by the appellant, was no more than 5,600 dollars, which he considered as a loan from *Bush* to *Livingston*; but, that as to any further consideration for the assignment of the mortgages, he was ignorant, though he acknowledged that he drew up the receipt given by *Bush* to *Livingston* on the execution of the assignment of the mortgages.

After publication had passed, and the cause, as between *Bush* and *Livingston*, was ready for hearing, *Livingston* became a bankrupt, and *Townsend* being duly appointed his assignee, *Bush*, in *February*, 1803, filed a supplemental bill, making him a party.

Townsend, in his answer, admitting himself assignee of the estate and effects of *Livingston*, craved the benefit of the pleadings and proceedings on the part of *Livingston*, and insisted on the several matters therein offered and insisted on by *Livingston*, as a defence and bar to the complainant's claim, which matters, he added, "he was informed and believed were true."

The cause, as against *Livingston*, came to a hearing upon the pleadings and proofs; as against *Townsend*, upon bill and answer, when the chancellor made a decretal order, directing an issue to determine whether the assignment to *Bush* was an usurious contract, or one *bona fide* made. As, however, no specification was made of the evidence to be read on the trial of the issue, and the counsel for the parties could not agree on what should be adduced, application was made for directions as to the proofs to be used, upon which his honour the chancellor was pleased to order, "that the parties have leave to read in evidence the complainant's bill of complaint, the answer of the defendant, *Peter W. Livingston*, the mortgages in the pleadings mentioned, and the assignments thereof, with the exhibits and proofs taken and used at the hearing of this cause in this court, saving to the parties just exceptions to the said defendant's answer, so far as the same is not an answer to the *matters alleged* in the said bill of complaint; and further, that the said parties respectively be allowed to offer any additional, or other evidence, which may be pertinent to the issue so to be tried."

From this order the complainant appealed, contending, that it ought either to have designated what specific parts of the bill, mortgages, &c. should be read in evidence, or have left it at large to the supreme court, to determine what should be so used; because, from the manner in which the order was expressed, it was referred to the supreme court to determine what should be deemed an *allegation* in the bill. He also insisted, that whatever might be the decision on this point, still, as the court now had the

ALBANY,
February, 1805.

Bush
v.
Livingston and
Townsend.

ALBANY,
February, 1895.

Bush
v.
Livingston and
Townsend.

whole case before them, they would, *of course*, decree definitively on the matter, and that, therefore, he had a right to suggest and insist on whatever might be deemed material, to show that he was entitled to a decree of foreclosure, which this court might pronounce, and remand the cause to chancery, merely to carry such decree into effect.

The respondents, on the other hand, urged, that the order alone, being appealed from, this tribunal had only to decide, whether the chancellor, on ordering a feigned issue, has power to direct what proofs are to be offered ; and, if he has, whether such power was, on the present occasion, legally exercised ?

On the cause being brought on, the chancellor thus assigned his reasons.

Mr. President, the bill in this case, after stating the mortgage and assignment, and alleging that the latter was for a full and valuable consideration to the appellant, contained no particular interrogatories, but merely required the respondents to make true, distinct and perfect answers, upon their corporal oaths, to the matters and things in the said bill set forth.—The respondent, *Livingston*, stated the assignment to have been made for a usurious consideration. This appeared to me pertinent to, and a direct answer to one of the objects of the general interrogatory.

This part of the answer cannot be reconciled to the testimony of *Mr. Evertson*, and it was, therefore, a proper subject for an issue.

That the bill might have been so drawn as to avoid this consequence, as was strongly urged, could not vary the result. The answer contained a precise negation of the allegation on the part of the appellant,

that the assignment was made, for a full and valuable consideration; and, I take it, I could not decree against this answer, on the testimony of one witness contradicting it. I, therefore, directed an issue, to try whether the assignment was a usurious, or a *bona fide* contract.

ALBANY,
February, 1805.

Bush
v.
Livingston and
T. Wm. send.

The certain effect of sending the matter to a jury, without the answer, unless the allegation of the respondent could be effectually supported *aliunde*, would be a verdict disaffirming the answer.

But the intent of the issue is to refer to a jury, whether the greatest degree of credibility is to be attached to the answer, or to the deposition. If either party have any auxiliary evidence, *that* may cause the one, or the other to preponderate; but to compare, they must, of course, be contrasted and weighed.

The circumstances of the case, and the rule to be observed, appear, to me, too clear to admit of doubt.

It was said, there was no general rule on the subject; but the rule is well established, that if a case be sent to a jury, on the ground of the evidence being in *equilibrio*, the answer must be sent, as well as the evidence in the cause.

Withdraw the answer, and the scale must, in a moment, kick the beam, for then, there is nothing to form an equipoise.

But it was said, that the allegations of the defendant were in avoidance, and so not evidence. This, I conceive, has been already answered, and, therefore, it is not necessary to repeat my former opinion.

I, therefore, sent the answer to the jury, as part of the matter on which they were to determine.

2 Atk. 140.
1 Vern. 161.
2 Chan. Ca. 8.
1 Bra. C. Ca. 58.

ALBANY,
February, 1805.

Bush
v.
Livingston and
Townsend.

Benson, for the appellant. The permission given to read the answer of *Livingston*, in evidence, on the point in issue, that is, whether the contract were usurious or not, was improper; because, *that* part only of an answer can be adduced in testimony, which is an answer to the allegations of the bill. Whatever goes in avoidance, even of that which is admitted, must be proved. *Gilb. L. Ev.* 52. As, therefore, the bill did not allege usury, but the defendant insisted on it, in avoidance of the securities alleged to have been entered into, the circumstances creating the usury, could not legally derive any support from the answer. This doctrine is sanctioned in *Barn. Ch. Rep.* 373,* where it is said, that, on an injunction bill, "if a plain equity be set forth by the bill, and admitted by the answer, but endeavoured to be avoided by another fact, the injunction shall always be continued till the hearing." The same principle is to be found in 2 *Eq. Ca. Abr.* 247. It is no argument against this, to urge, that the bill states the assignments to have been made "for a full and valuable consideration." They are words of course, the addition of counsel, and mere surplusage; for it was not necessary to do more than state the execution of the deeds, and pray a foreclosure. Besides, the expression itself is used with a reference to the indorsements on the mortgages, and cannot, therefore, be deemed a substantive allegation. We also contend, that, in the present instance, the chancellor had no right to order an issue. This is a power to be exercised only in cases of doubt, where the question is on the credibility of witnesses, or on which side circumstances preponderate. Here, there could be no hesitation. The answer of *Livingston*

* *Allen v. Crockett*.

was inadmissible on the point of usury, and *Evertson*, his own witness, who cannot, therefore, be discredited by him, says, he knew not of any. But, admitting that *Livingston's* answer is to be received as testimony; it does not contain any fact amounting, in judgment of law, to usury, so as to affect the securities in the hands of the appellant. The statute against usury applies only to original contracts between borrower and lender, upon which securities are given. The maxim, therefore, is, once usury and always usury; but if not usury in its inception, it can never become so afterwards. It follows, that subsequent discounts or purchases at an under value, however unconscientious, can never taint the original contract. But however this may be, as all the transactions relating, both to the original contract and the assignment, are fully before the court, and as it is not pretended that any further light can be thrown on the subject, the tribunal, before which the cause is now brought, will decide on the whole case, without referring it back to an examination, which will serve only to bring it here again. In *Le Guen's* case the same thing was done, and it is no more than the ordinary course of the court.

Riggs & Hoffman, contra. To determine whether the answer of *Livingston* ought to have been ordered to be read as evidence, it is only necessary to recur to the practice of the court of chancery, and the circumstances of the case. As to the first; whatever is stated in the bill must be answered, though not interrogated to; for were all the interrogatories, which are usually annexed to a bill, totally omitted, still every part must be answered; because

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ALBANY,
February, 1805.

Bush
v.
Livingston and
Townsend.

ALBANY,
February, 1803.

Bush
v.
Livingston and
Townsend.

what it sets forth is deemed an allegation. Thus, a defendant is under the necessity of answering, on oath, what is contained in the bill; and the plaintiff has the advantage of purging the conscience of his adversary. But when he has done this, he cannot take a part of the answer which suits his purpose, and reject the residue, under a pretence, that the matter in his bill to which it applies, was surplusage, and needed not to have been answered. Here a consideration was set forth, on which the assignment of the mortgages was made. The defendant, *Livingston*, was therefore called on, either to admit the consideration as stated, show some other, or deny it altogether. He has shown it to be usurious, and had the cause, with respect to him, gone to trial on bill and answer, it would have been complete evidence. There was, however, a witness examined, and as the chancellor might apply for the assistance of a jury, to aid his determination, it was indispensable to order the answer to be read in evidence, for otherwise there would have been nothing to oppose to, or explain the testimony of *Evertson*, and the verdict must necessarily have been according to his depositions. It was requisite that *Livingston's* answer should be read in testimony on another ground. The cause, as between *Bush & Townsend*, went to trial on bill and answer; all, therefore, that he says, he believes to be true, and what he refers himself to, must be received as truth. The answer of *Livingston* he expressly mentions, adding, that he had been informed and believed "the matters therein contained were true." Besides, when *Townsend* was, by the supplemental bill, made a party, *Livingston* became a substantial witness. That the chancellor can direct an issue only where the testimony

clashes, is not correct. In 2 *Vern.* 554,* the answer of the defendant was directed to be read in evidence, merely to enable to draw an inference. The truth is, that, in most cases, it is discretionary in the chancellor, whether he will send the cause to a jury or not, and that there is no settled practice on the subject, except where an answer denies, what one witness affirms. Then, indeed, an issue is ordered of course, because, on such occasions, the rule is, that chancery cannot make a decree. *Lord Milton v. Edgworth and others*, 6 *Bro. Pa. Ca.* 580. *Pember & ux. v. Mathers*. 1 *Bro. Ch. Rep.* 52. The principles on which courts of equity proceed, when they order an issue at law, are fully laid down by *Lord Kenyon*, in 7 *D. & E.* 667.† If, says he, “a court of equity direct an issue to be tried, it may modify it in any way it thinks proper. One of the rules of courts of equity is, that they cannot decree against the oath of the party himself, on the evidence of one witness alone, without other circumstances; but, when the point is doubtful, they send it to be tried at law, directing that the answer of the party shall be read on the trial; so they may order, that a party shall not set up a legal term on the trial, or that the plaintiff himself shall be examined, and when the issue comes from a court of equity with any of these directions, the courts of law comply with the terms on which it is so directed to be tried.” As to matter of avoidance being to be proved, that we do not deny. The nature, however, of an avoidance is to be seen. It is something subsequent and *dehors* that which is admitted or alleged. As if a debt be acknowledged, but it be added “you released it,” or “I paid it.” There the release, or

ALBANY,
February, 1805.

Bush
v.
Livingston and
Townsend.

* *J. v. Gison v.*
Rhodes.

† *Baerman v.*
Rudenius.

ALBANY,
February, 1805.

Bush
v.
Livingston and
Townsend.

* *Woollet v.*
Roberts.

payment, being matter of avoidance, must be proved. The answer is not by way of avoidance of that which is admitted, but of showing it to be otherwise than stated, and was, therefore, proper testimony. Not only the answer, but the very bill may be ordered to be read in evidence. 1 *Morg. Ess.* 111. 1 *Ch. C'a.* 65.* The chancellor, therefore, had the power to order the issue directed, modifying, as he pleased, the evidence to be used, and, though the reading the answer is confined to the allegations of the bill, that part relating to the consideration of the assignment was proper, because it was alleged to have been *bona fide*. The circumstances of this case render it peculiarly a matter for jury reference. *Bush* is stated to have paid but 5,600 dollars to *Evertson*, and the consideration mentioned, in the assignment itself, is 6,000 dollars. It ought, therefore, to have been left to a verdict of twelve men to ascertain whether the *extra* 400 dollars was not a usurious forbearance for 90 days. That it was so, seems almost confessed. *Bush* sets forth, that *Livingston* applied to him to borrow money; *Livingston* admits it to be a loan, and *Evertson* asserts, that he thought the 5,600 dollars were lent by the appellant. When all parties thus call the transaction a loan, it cannot be pretended it was a purchase. It is said, however, if the primitive contract was not usurious, no subsequent matter will make it so. True, as between the original parties. But what is the contract here? The mortgages? No. The debt created between *Livingston* and *Bush* to pay off those mortgages, and for which the assignment was to be the security. *Bush* takes the mortgages, not on the original valid consideration, but on

one that was foreign to them, new, and tainted. It is strange that the securities shall stand good for a consideration, which, if they did not exist, would be illegal. It has been ruled, that the security was void, though the debt remained, but never till now argued that the debt was void and the security good. This would be an easy mode of slipping through and evading the statute. Wherever there is a borrowing and lending, it is within the act, and it is not in the wit of man to frame a contrivance to take the transaction out of its operation. *Cowp.* 115.* 776.† *Doug.* 740.‡ In 5 *Bac. Abr.* 419. *old ed. pl.* 6, there is a case which shows that usury may take place upon a security originally good, and be insisted upon, between the parties themselves.§ The indorsor of a note for 200 pounds, which had three months to run, passed it to the plaintiff, for the consideration of 197 pounds; at the end of that time, another note at three months, for 200 pounds was given, and 3 pounds more paid. It was by *Lee, C. J.* referred to a jury, to determine whether the transaction was a loan or a purchase; they determined it to be the former, and it was held usury. This authority does away all idea of a purchase, and establishes, that a new security for a debt originally legal, if compounded with a usurious receipt of interest, is bad for the whole, as against the borrower. But though the subject of usury or not, has been entered into, this court can pronounce only on that which is appealed from; the order and its contents.

Harison and Benson in reply. We do not deny the power of a court of equity to send a case to a jury. But it is not an *ad libitum* power, and, when exercised must be for the determination of a fact, not a matter of law. Here the simple question was, whether, on

ALBANY,
February, 1805.

Bush
v.
Livingston and
Townsend.

* *Floyer v. Edwards.*

† *Jestons v. Brooks.*

‡ *Lowe v. Waller.*

§ *Massa v. Daniels,* 2 *Str.* 1143.

ALBANY,
February, 1805.

Bush
v.
Livingston and
Townsend.

the circumstances detailed, the transaction were usual or not. This being an inference of law, ought to have been made by the chancellor. He could not contemplate the addition of *Livingston's* testimony as a witness, because, to render it admissible, he must have released the surplus of his estate, and the contingency of such an event was, in itself, sufficient to prevent any measure being taken upon the expectation of it. Besides, the issue is, in fact, to try whether the defendant, or his own witness, is to be believed. There is no instance of such an order. Allowing, however, that it was correct to send this cause to a jury, *that* could not be directed to be used as evidence before them, which was not so in chancery.—The answer would not, even there, have been testimony to establish the usury; for, as containing new matter, in avoidance, it must have been proved by something extrinsic. For, what avoids, needs not be subsequent. Any circumstance which destroys the otherwise legal consequence of a thing, whether it be cotemporaneous, concurrent or subsequent, is matter of avoidance. Thus, infancy and usury are avoidances, but the former is not a subsequent matter, and the latter takes place in the formation of the contract it avoids, at the very time it is created; yet each, if relied on, must be proved. On this point, the rule in equity, is the same as at law. In both, the defence must be strictly made out by evidence. This principle is found in *Tate v. Wellins*, 3 D. & E. 531. Because, as is laid down in 5 Bac. Abr. old ed. 420, pl. 7, “a court will not easily avoid a bond, and the corrupt agreement ought to be specially and particularly set forth, and the *quantum* of interest, otherwise the plaintiff can never tell what to answer.” It

is not possible to vacate the securities in the hands of the appellant, on the score of usury, unless it be shown to have existed in the original transaction between *Livingston* and *Evertson*, for it is in right of the latter that *Bush* now claims. He can recover from *Livingston* no more than is due in virtue of the primitive contract, which cannot be impeached by an *ex post facto* agreement between *Livingston* and the assignee of *Evertson*. Neither in law nor in equity, is the plea of usury a favourite. By each tribunal the money actually paid is deemed in conscience due, and endeavours are invariably made by both, to give back the principal and legal interest, though they may deny the surplus or excess. In a case in 4 D. & E.* it was *una voce* laid down, that if an instrument can, by any reasonable construction, be considered not usurious, the court was bound to do so. As, therefore, in this case, the whole merits are before the court, and the securities held by the appellant were given on a *bona fide* consideration, we ask for a final decree.

ALBANY,
February, 1805.

Bush
v.
Livingston and
Townsend.

* *Le Grange v.*
Hamilton, 4 D.
& E. 613.

Per curiam, delivered by SPENCER, J. The appellant's counsel have insisted on the argument,

1st. That so much of *Livingston's* answer as charges the appellant with usury, is not evidence, and is to be proved *aliunde*.

2d. That the order of the chancellor, in leaving at large, what part of the answer was to be read, is therein erroneous.

3d. That if *Livingston's* answer is to be received as evidence, *in toto*, the charge of usury is not, in law, established.

4th. That an issue ought not to have been directed in consequence of contradictions, between *Livingston* and his own witness, *Evertson*.

ALBANY,
February, 1805.

Bush
v.
Livingston and
Townsend.

5th. That the whole merits of the case being before this court, it will decide thereon definitively, and remit the cause to be carried into execution.

The counsel for the respondents have combatted these propositions, and insisted,

1st. That, independent of *Livingston's* answer, the fact of usury is made out.

2d. That from the state of proceedings, in relation to *Townsend*, the charge of usury is established.

3d. That from *Livingston's* bankruptcy he can now be rendered a competent witness, and, therefore, an issue ought to be directed.

In investigating this cause, several of the points raised will not be examined, as a decision on them would be superfluous, from the view I have taken of the subject. It appears to me, from the authorities I have consulted, that, admitting *Livingston's* answer in relation to the usury to be evidence, and to stand uncontradicted, I still must maintain, that there existed no usury as applicable to the bonds and mortgages assigned to the appellant; and that, whether the answer is or is not evidence, still, that with respect to the excess of the 5,600 dollars paid by the appellant to *Evertson*, the testimony of the latter, and the admissions in the bill, show that the appellant cannot recover it.

I now proceed to examine whether the transactions stated in *Livingston's* answer, will, under the notion of usury, deprive the appellant of his right to hold the mortgages assigned to him as a security for 5,600 dollars, and the legal interest which has since accrued thereon. In the research I have made, I have met with no authority, or even *dictum*, that a security for the payment of money, in its inception uncontami-

ALBANY,
February, 1805.

Bush
v.
Livingston and
Townsend.

nated with usury, can, by an *ex post facto* agreement for a receipt of a greater sum than the statute allows for forbearance, be rendered usurious. In the case read by the respondents' counsel, from 5 *Bac. Abr.* 419, *pl.* 6, there was a renewed obligation, in which the usury and the *bona fide* debt were consolidated, and there it was held to be usurious. But this case is not law, as will, I think, be hereafter shown.

The first essential to usury is, that there be a loan. *Hawkins*, in 2 *vol.* 373, *sec.* 1, says, "that it is a contract, on the loan of money, to give the lender a certain profit for the use of it upon all events, whether the borrower make any advantage of it or not, or the lender suffer any prejudice." It is true, that it may take place in relation to the rent of lands, or the sale of goods, but, as applicable to this case, an inquiry into usury of that kind cannot be necessary.

It is true, that the appellant, *Livingston*, and the witness, *Evertson*, speak of the money paid by the former to the latter, as a loan from *Bush* to *Livingston*. The transaction, however, must decide that point, and not the expressions and language of the parties. *Bush* says, that *Evertson* having demanded payment of his debt, *Livingston* applied to him, and requested him to lend him a sum sufficient for that purpose, and offered to secure the repayment thereof, by procuring an assignment to *Bush* from *Evertson*; and that, accordingly, on the 22d of *July*, 1799, the assignments were made in due form of law. *Livingston* states, that, being urged by his necessities, he applied to *Bush* to borrow a sum of money to pay off the bonds and mortgages, and that *Bush*, taking advantage of his necessities, offered to loan him 5,600 dollars for ninety days, if he would allow him for the

L

ALBANY,
February, 1805.

Bush
v.
Livingston and
Townsend.

forbearance 400 dollars, to which he consented. That it was then agreed between *Bush*, *Evertson* and himself, that *Bush* should pay *Evertson* 5,600 dollars towards satisfying him for the amount due on the bonds and mortgages, and that *Livingston* should secure to *Evertson* what should remain due for principal and interest, *Evertson* assigning to *Bush*, to secure him the repayment of the 5,600 dollars, and also the 400 dollars, in pursuance of which agreement, the bonds and mortgages were assigned. *Evertson* deposes, that he understood and believed the 5,600 dollars paid him by *Bush* was a loan from *Bush* to *Livingston*, and his reason for so believing was, that the money was paid at the request of *Livingston* for his sole benefit. The transaction between *Bush* and *Livingston* was substantially this: *Bush*, to gain 400 dollars for ninety days forbearing of 5,600 dollars, advanced the latter sum to *Evertson* for *Livingston*, upon good and valid securities, and took the assignments as for 6,000 dollars.

As between *Evertson* and *Bush*, there can be no question that the latter became invested with all the right of the former to the sum then actually due on the bonds and mortgages. In fact, this payment was not a loan to *Livingston*, because *Bush* paid it to *Evertson*, as the consideration of his assignment. If *Evertson* himself, without the intervention of *Bush*, had exacted 400 dollars, or any other sum, from *Livingston*, for forbearance for a limited period, such exaction, however usurious, would not invalidate the *bona fide* securities. In the case of *Pollard v. Scholy, Cro. Eliz.* 20, *Pollard* sold to *Scholy* two oxen for 6*l.* 6*s.* 8*d.* payable at *All Saints* next; on the same day *Scholy* required a longer time; *Pollard* gave him to the first of *May*, paying to him for forbearance, three quar-

ters of wheat, which amounted to more than the legal interest. In debt for the 6*l.* 6*s.* 8*d.* the defendant pleaded this in avoidance of the contract. The opinion of the justices was, "that the statute does not make the contract void which was duly made, but doth only avoid all contracts for usury, and this last contract is void, being against the statute, but the first was good, being made *bona fide*.* In 2 *Hurk.* 377, *sect.* 17, is this case—"A. was fairly indebted to B. in 1,125*l.* and on A. desiring time to pay it, B. insisted that 150*l.* should be added to the debt, as he would have nothing to do with interest. Accordingly, A. gave him five acceptances for these two sums, payable within fourteen months, and it was held, that the *bona fide* debt subsisted, unimpeached by the subsequent usurious transaction."† A reference to the reporter, from whom the antecedent decision is taken, fully justifies the summary of the case in *Hurkins*. The same principle is recognised in 7 *Mod.* 119.‡ *Sir T. Ray.* 196.§ 4 *Burr.* 2253.¶ and in *Vin. Abr. Tit. Usury, H. pl.* 6, it is laid down, "that if the first contract is not usurious, it shall never be made so by matter *ex post facto*." The case of *Ferral v. Shaen*, 1 *Saund.* 294, is also to the same effect, that a bond, which was good when made, is not avoided by a subsequent usurious contract for delaying the day of payment.

All these authorities proceed on the wording of the statutes against usury. They forbid the taking more than the rate of interest prescribed, and declare all assurances, &c. whereby more shall be reserved, or taken, to be void. Now if, in this case, the bonds and mortgages in their creation were valid, if no more interest was reserved than the law allowed, how can

ALBANY,
February, 1805.

Bush
v.
Livingston and
Townsend.

* See *Turner v. Hulme*, 4 *Esp. Rep.* 11, a note given for the liberation of a defendant under arrest, on a usurious note, though for the amount of the very usurious note, cannot be impeached for the usury of the first note, where a third person joins in the second note.
† *Gray v. Fowler*, 1 *H. Black.* 462, *S. C.*
‡ *The Queen v. Sewel*.
§ *Rex v. Allen*.
¶ *Abrahams v. Bunn*.

ALBANY,
February, 1805.

Bush
v.
Livingston and
Townsend.

they, conformably to this statute, and the universally concurring expositions of it, become void? If the mortgages and bonds cannot be affected by the charge of usury, much less can the assignment, for the reason, that this is an act between *Evertson* and *Bush*. *Evertson* was capable of parting with his interest in these securities, and *Bush* of taking it. *Evertson* has assigned, for an adequate consideration, all his right to the bonds and mortgages, and this cannot be impeached on the pretence of usury between *Bush* and *Livingston*; because, as *Livingston* is not a party to the assignment, he cannot complain that it is an assurance by which he is bound to pay more than the sum then due on the mortgages.

I think the appellant not entitled to recover more than the 5,600 dollars, and the interest, on two principles, independently of *Livingston's* answer. 1st. When *Evertson* made the assignment, *Livingston*, as is proved by *Evertson*, gave him two promissory notes for the balance beyond the 5,600 dollars paid him by *Bush*. These notes were accepted by him as a payment of so much, towards the mortgages and his account, and have since been actually paid in full. The assignee of all *choses* in action, excepting bills of exchange and notes, takes them subject to all the equities between the original parties. *Bush*, therefore, though assignee, nominally, for 6,000 dollars, can exact no more than *Evertson* could, and clearly, by transactions between *Evertson* and *Livingston*, before or at the time of assignment, no more, as between *them*, than 5,600 dollars could be collected on the bonds and mortgages. But 2dly, from the appellant's state of his own case, in connection with the testimony of *Evertson*, it appears, evidently, that the

appellant availed himself of the necessities of *Livingston* to obtain more than legal interest; and, to use the expressions of Lord *Mansfield*, "though the transaction itself may not amount to usury, yet it was taking a hard and unconscionable advantage." In the case of *Floyer v. Edwards*, *Cowp.* 116, it was held that money, thus claimed, should not be recovered in an action for money had and received. In a court of equity, whose peculiar jurisdiction it is to relieve in cases of fraud, and whose maxim it is, *that he who would have equity, must do equity*, I think there can be no doubt, that, apart from the consideration of usury, the appellant ought not to recover beyond the 5,600 dollars and the interest. To this I conceive him well entitled. The principles I have advanced, and the conclusions I have drawn, lead to the most equitable and righteous result. The appellant obtains the money really advanced, with interest, and the respondent is relieved from the advantages attempted to be taken of his distresses by the appellant.

It will be observed, that I have abstained from any inquiry into the correctness of the chancellor's order in point of form; because, in my opinion, the issue, if correct in form, would have been upon a point wholly immaterial. The respondents could never have made out more than *Livingston* alleges, and on his allegations, taking them for true, my opinion has proceeded, so far as respects the question of usury.

There remains only one point necessary to be considered; that is, whether this court will finally decide the cause? In the case of *Gouverneur & Kemble v.*

ALBANY,
February, 1805.

Bush
v.
Livingston and
Townsend.

ALBANY,
February, 1805

Hallett &
Bowne

v.
Jenks.

Le Guen, this court, on an appeal from the order of the chancellor, directing an issue, finally decided the cause, and directed the complainant's bill to be dismissed. It did so on precedents from the proceedings of the House of Lords, in England, on appeals from chancery, and because the whole merits of the case were before the court. When it is considered that there can be no further proofs in the cause, that the whole merits have been discussed and reviewed, that it will save litigation and expense, I am myself contented to be bound by the precedent which has been made. In my opinion, the order appealed from ought to be reversed, and an order entered, that the chancellor decree the respondents to pay the appellant, by a time to be limited, 5,600 dollars, with interest, from the 22d of July, 1799, with costs, in the court below to be taxed, or that the respondents be foreclosed their equity of redemption.

Judgment of reversal accordingly.

Hallet and Bowne *against* Jenks.

Setting down
causes for
hearing.

IT was ruled, that a cause cannot be set down for hearing, till cases are delivered.

Amos Wetmore, Appellant,
against

Hugh White, and Hugh White Junior, Respondents.

ALBANY,
February, 1805.

Wetmore
v.
White & White.

THE appellant being seised of 250 acres of land, on the east side of the *Sagquate* creek, in *Whites-town*, together with a moiety of the soil under water, and the respondent, *Hugh White*, the father, being seised of 300 acres on the west side, with the other moiety of the bed of the creek, entered, in the year 1787, into a verbal engagement, to divert, on their joint account, for the use and purpose of mills to be erected, the water of the stream to such spot in the grounds of either, as should, in the opinion of one *John Beardsley*, be most proper for the site of a mill. In pursuance of this agreement, *Beardsley* examined the ground on both sides of the creek, and fixed upon a place in the lands of the appellant. Having thus ascertained where the erection should be made, *Wetmore*, *White* senior, and *Beardsley*, on the 13th of *May*, 1788, executed a written agreement, to build a grist-mill, on *Wetmore's* land, a few rods north of his house; he and *White*, to "own" each one-fourth of the mill, in consideration of furnishing all materials, &c. and constructing the dam to turn the water of the creek; *Beardsley* to "own" the other two-fourths, on doing the carpenter's work, &c. Upon these terms the mill and dam, being in the course of the year 1788, completed, it was, about the time when they were finished, verbally agreed between the same parties, to build, adjoining to the grist-mill, a saw-mill, to be supplied with water in the same manner, and to be "owned" in equal proportions by the three. This also being carried into effect, the mills were used and

By a sale of mills, the water of the race-way, will pass as an incident. If the water in a stream be owned by two persons, whose lands are on opposite sides, & they agree to erect mills on the land of one, and turn the whole stream to the mills; it is an appropriation of the water to the mills, and if they be held jointly, or in common, a release of the right of one tenant in the mills, will pass his right in the water also. Payment of consideration money, possession and making improvements, take a case out of the statute of frauds, and will entitle to a decree, for a specific performance.

ALBANY,
February, 1805.

Wetmore
v.
White & White.

enjoyed according to the preceding agreements, for about three years; when, being very much out of repair, *Beardsley*, in 1791, in consideration of 600 dollars, by release, duly transferred his interest in them, to the appellant, who, under a parol contract, when they were totally unfit for use, shortly after purchased from *Hugh White*, the father, his proportions, for 187 dollars, and paid the money, but received no conveyance of the shares *White* held in the property, nor was any thing said of the right to the water of the creek.

On concluding the antecedent transactions, the appellant took down the saw-mill, which had become perfectly useless, and rebuilt it entirely. He also, after thoroughly repairing the grist-mill, added a pair of new mill-stones, and peaceably enjoyed both mills, for the space of one year, when they were accidentally burnt down.

Immediately after their being thus destroyed, the appellant, at a very great expense, and without any opposition or molestation from the respondents, rebuilt the mills, and continued in the use and occupation of them, and the uninterrupted enjoyment of the water of the creek, until *August* 1797, when the respondent, *Hugh White*, the father, threatened that he would cut down the dam, and deprive the appellant of the use of the water, unless he would become a *Presbyterian*, and join the congregation under the charge of the reverend *Bethuel Dodd*, and would also build a dam and turn one-half of the water of the creek over a meadow contiguous to the *Saghquate*, and adjoining to the dam erected for the use of the mills; which meadow, on the 25th of *April*, 1794, the respondent, *Hugh White*, had, in consideration of blood

and natural affection, conveyed, with a moiety of the waters of the creek, to his son, *Hugh White*, junior, the other respondent.

ALBANY,
February, 1805.

Wetmore
v.
White & White.

In *September* and *October*, 1797, the dam across the creek was, to the great injury of the mills, at three several times cut through, and the water permitted to escape.

On the 5th *December*, 1797, the appellant filed a bill in chancery, stating the antecedent circumstances, with a prayer for a writ of injunction, to restrain the respondents from molesting or disturbing him in the enjoyment of the mills, mill-dam, and the water of the *Saguate* creek ; that he might be quieted in his possession of them, and for such further, and other relief, as the court might please to direct.

To this bill, the respondents, on the 3d of *August*, 1798, put in their joint and several answers, in which they admitted the situation of the lands of the appellant, and respondent, *Hugh White*, the father ; the parol engagement to erect the mill-dam and mills ; the written engagement ; the sale by *White*, of *his shares in the mills* ; the payment of the consideration money ; that there was a preliminary conversation between him and the appellant, about securing, in some proper manner, the water of the creek for the mills when erected ; and a *continued necessity*, for several years after the sale to the appellant, of the mills, *for the accommodation* of the public : that they were burnt down and rebuilt, &c. but the answer denied, that the right or privilege in the waters of the creek, had ever been parted with to the appellant, or that he had paid any consideration for it ; or, that he had any right to appropriate the waters of the creek to the use of the mills ; or to maintain the dam for turning the water from its usual course. The answer

M

ALBANY,
February, 1805.

Wetmore

White & White.

also set forth, that 202 dollars and 40 cents, had, besides some other contingent charges, been paid by *White*, the father, as his proportion of the expenses for building the mills, and that he had sold his interest in them, for only 182 dollars 50 cents, at a time when they were in such repair, and in which they continued for a considerable time afterwards, as to be able to do business as well as at any time since their erection. That soon after their destruction, *White*, the father, as he believed, in a conversation with the appellant, explained to him the nature of the contract for the sale of the mills, and then utterly denied the appellant's right to the water; that the appellant had never requested a conveyance of the right of water, and had, from a consciousness of his having none, erected at his own expense, a temporary dam, below that for the use of the mills, in order to turn the water into the respondents' meadow, the want of which, in consequence of the upper dam, annually injured the crop of hay, and could not be compensated for, by even 1,500 dollars; they also insisted on the statute of frauds.

The testimony, the essence of which is given in the decision of the court, in general corroborated the facts in the bill, and from that given by two of the witnesses, it appeared, that the understanding of the parties at the time of the first parol agreement was, wherever the mills were built, "*there the waters were to go.*" That *Beardsley* considered the right to the water, as perpetually annexed to the mills, and never entertained any apprehension of its being liable to be taken away.

The cause having been heard, his honour the chancellor, dismissed the appellant's bill with costs, from which decree he now appealed, and his honour thus assigned his reasons.

Mr. President. The appellant deduces his equity from two sources : 1st. A parol contract relating to the saw-mill ; and, 2d. A written contract relating to the grist-mill.

ALBANY,
February, 1805.
Wetmore
v.
White & White.

It is necessary, in the first place, to determine the extent of the parol contract, as arising from the admissions and proofs of the parties.

From the terms of the bill, it would appear, that the appellant intended to avail himself of both the written and parol contracts, as forming one general connected arrangement, of the whole interests, in the subject of controversy.

It states, that *it was* agreed between the appellant, *John Beardsley* and *Hugh White*, senior, to complete a *grist and saw-mill*, for their joint use, and at their joint expense, on the land of the appellant.— That *John Beardsley*, was to have one-half of the grist-mill, and the other parties, each one-fourth ; and that each of the parties was to have one-third of the saw-mill, each contributing a proportional share of the expense. That *Beardsley* should allow, to the appellant, a reasonable compensation for his land, and a like compensation to the respondent, *Hugh White*, senior, and the appellant, *for the use of the water*.

The respondents admitted, that it was agreed to build the mills, and that the interests were to be in the proportions stated in the bill. But they deny that any contract was entered into, respecting the water, or that *Beardsley* had a right in it, or paid for it.

The only witness who has any knowledge of the parol contract, between the parties, is *Beardsley* ; and, if his testimony is in direct opposition to that

ALBANY,
February, 1805.

Wetmore
v.
White & White.

part of the respondents' answer, which he was required to make, by the terms of the bill, it might neutralize the answer, but can have no effect beyond that, unless aided by other evidence or circumstances. But all the circumstances developed, tend to corroborate the answer.

Beardsley's testimony is very indistinct, from a want of discrimination, as to the object to which it applies. He confounds the grist and saw-mills; the parol and written agreements; and I found it impracticable, from his relation, to distinguish satisfactorily, what part was intended to apply to the written, and what to the parol contract. The same confusion is discernible as to time; and, whether he speaks of contemporaneous transactions, or those which took place at different periods, cannot be discovered.

Mills are generally calculated for duration. But those constructed by the parties, were so slight, that the appellant alleges, that, at the time he purchased of *Beardsley*, which, it appears, was in *October*, 1790, and probably, not more than two years after they were finished, (for the contract for this erection, was not made till *May*, 1788) they were already out of repair, and in a ruinous state at the time the respondent, *Hugh White*, senior, sold his interest in them, which it appears was early in 1791.

From the permanency of the object of association, on which much reliance was placed by the appellant's counsel, no important result can, therefore, be deduced, in favour of the construction they contend for.

Another circumstance, which throws some light on the subject in controversy, is; the different mode of conduct observed between the appellant and *Beardsley*, relating to the common interest, as far as respected that portion which the appellant contributed towards the common undertaking, and that which related to the property of *Hugh White*, the father.

ALBANY,
February, 1805.

Wetmore

White & White.

On the 18th of *March*, 1789, the appellant executed to *Beardsley*, an indenture for the undivided half of his land, intended for the accommodation of the mills, with express covenants for the diversion of the water in his own land, for there is nothing in the conveyance, indicating the claim of right to dispose of a privilege of that nature, in the land of the respondent, *Hugh White*, the elder; and, on the 9th of *October*, 1790, *Beardsley*, by indorsement on that conveyance, regrants the premises to the appellant.— This indorsement is confined to the subject of the former grant merely, and is evidently calculated only to revest the title derived under the conveyance.

There is no evidence of any application for a similar grant to the respondent, *Hugh White*, the father, and though the relationship, which existed between him and the appellant, has been urged as a reason for inducing an unusual confidence between the respondent, *Hugh White*, senior, and the appellant, that consideration would not apply to *Beardsley*, who, in his deposition, alleges, that he supposed the appellant “trusted to the honour and integrity of the defendant, *Hugh White*, senior, and considered the parol agreement as abundantly sufficient.” He was, however, more interested in the arrangement than

ALBANY,
February, 1805.

Wetmore
v.

White & White.

either of the other parties, and he gives no reason for his own conduct.

Both the appellant, and *Beardsley*, appear to have been fully apprised of the necessity of securing their reciprocal rights by conveyance ; and, that it was resorted to, in one instance, and unattended to in another, is a circumstance, which, unexplained as it is, has a strong appearance of a mutual reliance, on the advantages each possessed, to apply them to, or withhold them from, the common object of pursuit. The one party owned the land, on which the mills were erected ; the other, so much of the water, as contributed essentially to the value of the mills, though not so much of it, as by withdrawing the water, to render the mills totally useless.

Upon the whole, I do not think a parol agreement is made out in proof, admitting the evidence to be competent to sustain it, variant from, or enlarging the written contract and the parol contract, admitted by the answer, relating to the saw-mills. It is, therefore, unnecessary to examine the influence of the statute of frauds and perjuries on the case.

2d. As to the written contract.

This has no words evincive of the intent of the parties to perpetuate this joint interest, beyond the duration of the mill, which was the object of it. It recognises the land, on which it was to be built, as the land of the appellant, divides the contracting parties, by describing the appellant and the respondent, *Hugh White*, senior, as of the one part, and *Beardsley* of the other part, and thus, by opposing the interest of the latter, to that of the former, shows, that so far as respected the grist-mill, the most intimate union of in-

terest existed between the appellant and the respondent, *Hugh White*, the father; and that the confidence which they had in each other, could have no influence on *Beardsley*.

ALBANY,
February, 1805.
Wetmore
v.
White & White.

The mills erected in consequence of the written agreement, were destroyed by fire; and *Hugh White*, senior, declares in his answer, that he informed the appellant, before he rebuilt them, that the water was his; and that he had *not* sold it. This is an answer to the matter stated in the bill, to which he was interrogated, and of consequence available to him, to rebut the deductions, which might be otherwise made, from his tacit acquiescence in the rebuilding of the mills.

The subsequent conduct of both the appellant, and the respondent, *Hugh White*, senior, is an exposition of this intent; for, upon the purchase of *White's* share in the mills, by the appellant, instead of procuring a conveyance from *White*, for the rights necessary for his own accommodation, he is content with a mere verbal relinquishment of the share held by *White*, the father, in the mills. This is perfectly consistent with the views of the parties, if the contract was to operate merely to extinguish the rights acquired by the contract, by the respondent, *White*, senior, in the land of the appellant. But if the appellant's object were to acquire or perpetuate privileges in the land of the respondent, *White*, the father, the grant by him executed to *Beardsley*, and by *Beardsley* to him, show that he must have been acquainted with the proper mode of securing it.

I am persuaded, from the whole tenor of the transaction, that the parties, at the time of the contract, contemplated only a temporary establishment and

ALBANY,
February, 1805.

Wetmore
v.
White & White.

accommodation, to remove the inconvenience to which their remoteness from mills exposed them; that the conveyance from the appellant to *Beardsley*, cannot be admitted to aid the construction of the contract between the parties to it, as it does not appear that the respondent, *Hugh White*, the father, had any agency in, or was privy to it; and, that the better construction is, that the reciprocal interests of the parties were to be affected merely, while the principal objects of their enterprise, the mills, endured; that, those destroyed, it ceased to operate.

I was of opinion, therefore, that the appellant's bill ought to be dismissed with costs.

Platt, for the appellant. The equity of the appellant does not arise, *entirely* from the written and subsequent parol agreement, but also from the original parol contract for the erection of the mills, and appropriation of the water. That there was such an antecedent contract, serving as a *substratum* for the whole, and influencing the future acts of the parties, is proved not only by the testimony, but by the answers of the respondents; and, though *Beardsley* be one of the witnesses whose evidence shows this, yet no objection can be made to his competence, for they have made him their own. Besides, his assignment was a mere quit-claim.

These parol agreements having been in part executed, are uniformly held to be without the operation of the statute of frauds. 1 *Fonb.* 176 to 190. 1 *Pow. on Cont.* 295 to 299. 2 *Vern.* 455.* 1 *Bro. Ch. Ca.* 417.† 2 *Stra.* 783.‡ 3 *Atk.* 407.§ 7 *Bro. Pa. Ca.* 21.¶

* *Pyke v. Williams.*

† *Whitbread v. Brookhurst.*

‡ *Earl of Aylesford's case.*

§ *Only v. Walker.*

¶ *Newton v. Newton & Lee.*

It cannot be argued that the agreements intended to convey only a temporary interest, during the existence of the mills then constructed. The mere circumstance of turning the stream into an artificial and new bed, by digging a canal, negatives such an idea. Suppose the mills had been burnt down the day after their erection, would it have put an end to the contract ?

The establishment was in its nature permanent.— It partook of the quality of the fee on which erected ; the water was an appurtenance inseparable from it ; it was like soul and body.

That it was intended to be a permanent establishment, is evinced by the acts of the parties. They are inconsistent with any other intention ; and, it is a principle, that where a contract is not definite, but money laid out on it, the court will infer the terms, from the acts.

1 *Pow. on Cont.* 297. 2 *Eq. Ca. Abr.* 48. 5 *Vin.* 523.

2 *Vern.* 373.* The water was indispensable for the mills, and every thing essential to the use of a thing granted, must necessarily pass with it. 1 *Saund.* 322, 3.†

It is also settled, that where a contract is dubious, the strongest construction shall be against the seller.

1 *Pow. on Cont.* 395. 5 *Rep.* 7 b.‡ *Plowd.* 140.§ 161.¶ 171.** 289.†† *Co. Litt.* 197 a. 267 b. *Roll. Abr.* 228.

These authorities establish, that the respondent sold the waters of the creek. To them may be added 2 *Eq. Ca. Abr.* 685. pl. 8. 679. pl. 5. *Talbot's cases*, 252.‡‡ 262. 1 *Pow. on Cont.* 302. 2 *Vern.* 363.¶¶ 2 *Ves. J.* 440.¶¶ which show, that as the conveyance to *Hugh White*, junior, was voluntary, it cannot pre-

ALBANY,
February, 1805.

Wetmore
v.
White & White.

* *Halfpenny v. Ballet.*

† *Pomfret v. Ricraft.*

‡ *Dowman's case.*

§ *Browning v. Beston.*

¶ *Throckmorton v. Tracy.*

** *Hill v. Grange.*

†† *Chapman v. Dalton.*

‡‡ *Mansell v. Mansell.*

§§ *Dafforne v. Goodman.*

¶¶ *Taylor v. Stibbert.*

ALBANY,
February, 1805.

Wetmore
v.
White & White.

vail against a previous *bona fide* purchaser, for a valuable consideration; and, that at all events, as he was a purchaser with notice, the appellant's claim cannot be affected by the grant to the son.

* Brewerton v.
Gamul.

Had he intended to have relied on the deed, it ought to have been pleaded. *Wyatt*, 324, 335. 2 *Atk.* 240.* 2 *Eq. Ca. Abr.* 681. *pl.* 2. As to the statute, it applies to hereditaments.

† *Legal v. Miller.*
‡ *Leg v. Haverfield.*

Gold and Henry, contra. The contract was confined to the first mill erected, and the very written contract relied on, is not set forth by the bill, in *hæc verba*, and if that proved be different, the bill ought to be dismissed. 2 *Ves.* 299.† 5 *Ves. J.* 452.‡ In this, there is no mention of any agreement whatever, as to diverting the water, building a race-way, &c. The original parol agreement, can never be in issue. It was nothing more than a preliminary conversation, leading to the agreement, and was, when that was concluded, resolved into it.

Any agreement as to the water, is expressly denied, and if only one witness contradict the answer, no decree can be founded upon it. As to *Beardsley*, his testimony must be totally discarded. It is inconsistent and incredible; besides, being to uphold his own acts, it is totally inadmissible.

§ *Whitchurch v. Bevis.*

¶ *Cokes v. Mas-*
cal.

** *Binatead v. Coleman.*

†† *Parteriche v. Powlet.*

‡‡ *Irnham v. Child.*

§§ *Ackroyd v. Smithson.*

¶¶ *Hare v. Shearwood.*

If a plaintiff claim lands by a parol agreement, no witnesses can uphold it, for their testimony is inadmissible. None, *aliunde* the answer can be received. 2 *Bro. Ch. Ca.* 566, 7. § Where there is a written contract, no parol evidence is admissible, to alter or vary it, but only to rebut an equity. 2 *Vern.* 34. ¶ *Bunb.* 65.** 2 *Atk.* 383. †† 1 *Bro. Ch. Ca.* 93. ‡‡ 514. §§ 3 *Bro. Ch. Ca.* 168. ¶¶ 1 *Ves. J.* 241 *S. C.* 1 *Ves. J.*

326.* 402.† 3 *Bro. Ch. Ca.* 388. *S. C.* 4 *Bro. Ch. Ca.* 437.‡ 3 *Ves. J.* 34.§ 5 *Ves. J.* 686¶.

ALBANY,
February, 1805.

Wetmore

v.

White & White.

The doctrine of part performance has rendered the statute of frauds almost a dead letter. Except we be tied down by authorities that govern in this country, we ought to resist it. In England it is admitted to have been carried too far, and to support it, the facts ought to be of the most unequivocal nature. 3 *Ves. J.* 381.** 712.†† 4 *Ves. J.* 720. *Amb.* 586.†† 1 *Pow. on Cont.* 308. 309. 1 *Fonb.* 174, 5. Remaining in possession, is not such a fact as to be conclusive. The acts must be of such a nature, that the purchaser would otherwise be a loser. Here the appellant is more than compensated by his profits from the mill. We, therefore, contend, that the agreement insisted on, is not clearly shown; that part performance is not proved, and that the contract, such as it was, is, from the testimony, variant from that of the bill. To decide the establishment to be permanent, and the appellant entitled to the water, will be to make a new agreement, for both parties.

* *Brodie v. St. Paul.*

† *Jordan v. Sawkins.*

‡ *Mason v. Garuiner.*

§ *Pym v. Blackburn.*

¶ *Jackson v. Cator.*

** *Wills v. Stradling.*

†† *Forster v. Hale.*

‡‡ *Gunter v. Halsey.*

Van Vechten, in reply. The answer, if viewed attentively, will be seen to admit the original parol agreement. With this, the written contract is perfectly consistent. The bill stated the substance of the agreement, and that was sufficient. The cause was submitted in the court below, on this simple question, whether the establishment were permanent or not. To state more than was necessary to show that, is not, by any rule of law or equity, ever required. *Dormer v. Fortescue*, 3 *Atk.* 124 and 132. The written agreement disproves a material allegation in the answer, and so is admissible. It is also admissible to

ALBANY,
February, 1805.

We more

v.

White & White.

illustrate the views of the parties. If the defendant admit the agreement in his answer, he cannot, afterwards, insist on the statute of frauds.

So much water was, from every principle, to be turned off to the mills, as was done in the first instance. This was concurred in, afterwards, by both parties; therefore, then, no pretence for avoiding the contract, or excluding testimony on the ground of uncertainty.

The agreement to build, was confessedly executed. *White* does not pretend he ever explained his restrictive idea of the contract, till after the sale to the appellant. What interest did the parties think they had; what had they, in law, in the mills under the first executed agreement? It must have been a fee. This they all imagined, and the respondent, *White*, the father, permitted the appellant, under this idea, to go on expending money on the property, without ever undeceiving him. This was a fraud.

The relief for the appellant must be, 1st, a perpetual injunction; or, 2d, a conveyance, by the *Whites*, of their interests. The acquiescence of the respondents since 1791, is evidence of a permanent establishment.

The matters contended for by the appellant, the water, &c. are incidents to the mill, not realities.—The sale of the interest in the mills passed them of course.

Per curiam, delivered by THOMPSON, J. The only question litigated between the parties is, touching the right to the waters of the *Sagquate* creek, for the use of the mills, now owned and occupied by the appellant. A brief statement of some of the facts,

thrown into the case, but not controverted, may afford some assistance in ascertaining the truth with respect to those in dispute. It is admitted, that, in the year 1788, the appellant was seised of the lands on the east side of the *Saghquate* creek, together with an equal moiety of the creek itself. That *Hugh White* was seised of the lands on the west side of the creek, together with the other moiety of the creek, and that being so seised, they, together with one *Beardsley*, built a grist-mill and saw-mill upon the land of the appellant. That a canal was dug for the purpose of diverting some of the waters of the creek to those mills. That the parties continued to occupy them jointly, according to their respective proportions therein, for about three years, when the appellant purchased out the shares of his copartners. The purchase from *Hugh White* was by parol only, and upon this the controversy between the parties arises, presenting the following questions for examination. 1st. Whether the appellant ever acquired any right to the waters of the *Saghquate* creek, for the use of the mills? 2d. If so, whether that, was a temporary or a permanent right? 3d. Whether, the purchase being by parol, the respondents can avail themselves of the statute of frauds to avoid it?

The evidence appearing in the case, is partly written and partly parol, as to the applicability of which, to the subject matter of complaint in the appellant's bill, some little difficulty and confusion arises. The written testimony, the article of agreement, appears not to have had for its object, the securing of the water to be diverted from the *Saghquate* creek. It was between *White*, *Wetmore*, and *Beardsley*, and was

ALBANY,
February, 1805.

Wetmore
v.
White & White.

ALBANY,
February, 1805.

Wetmore
v.
White & White.

solely for the purpose of providing for the building of the mills, and fixing the proportion of the respective parties therein. The matter of complaint by the appellant's bill, is not for a violation of the articles of agreement, but for an interruption in the use of the waters of the *Saghquate* creek. This written agreement might be admissible, as illustrative of the views and intentions of the parties in erecting the mills, and, in some measure, explanatory of the testimony of some of the witnesses; but the right to divert the water must depend upon some other evidence. The bill of complaint, so far as it may refer to the articles of agreement, is to be considered as a history of circumstances leading to the main subjects of inquiry; the right to the use of the water, and the purchase by *Wetmore*, from *White*. The appellant alleges, that he purchased the shares of *White* in the mills, together with the privilege of the water, but reposing confidence in the integrity and uprightness of *White*, he omitted to take a conveyance therefor. This is the subject matter of the complaint, to which most of the testimony on both sides is pointed, and which the appellant alleges was not secured by writing.

The parol evidence on this subject, cannot be viewed as explanatory of the written agreement, or as a preliminary conversation leading to a contract consummated by the instrument in writing; but relating to a distinct and independent subject. An examination, therefore, into the original contract, respecting the water, in connection with the sale of the mills, and a decree bottomed thereon, would not, I think, be travelling out of the case, or a violation of the prin-

ciple, that the decree must be *secundum allegata et probata*.

ALBANY,
February, 1807.

Wetmore
v.
White & White.

That there was a contract made between *White* and *Wetmore*, relative to diverting the water to the mills, is manifest from the testimony in the cause, the acts of the parties, and the confessions of *White*. The extent of that contract will be hereafter examined. To establish this contract, there is the united, and uncontradicted testimony of three witnesses.

Lemuel Leavenworth, who was examined both on the part of the appellant and respondents, says, the parties went in the first place, to view the spot where the mills are at present situated; they then viewed the land on *White's* side, and it was agreed, in conversation, that wherever the mill was erected, "*there the water should go.*" That *John Beardsley*, was to determine where the place should be; and that he determined in favour of the place where the mills now are. To the respondents' interrogatories, he answered, that he knew of a verbal contract, for appropriating the waters of *Saghquate* creek, to the use of the mill or mills, to be erected on the same. *Amos Wetmore*, declared, that he had heard *Hugh White* say, that wherever the mills should be built, there the water should go. *John Beardsley* swore, that it was agreed between *Hugh White* and *Wetmore*, that wherever the mills should be built, there the water should go. In conformity to this agreement, we find the parties digging a canal, building a dam across the *Saghquate* creek, and turning the water to the mills.

White, in his answer, I think, impliedly admits, that there had been a contract relative to the water; though he says, the particular plan "*for securing it,*" had not been matured, or carried into effect; evidently, I

ALBANY,
February, 1805.

Wetmore
v.
White & White.

conceive, alluding to its not having been reduced to writing.

If, then, there was an agreement to divert the natural course of this creek, the object clearly was for the use of the mills. The same reason that existed at first, for turning the water, would continue to exist as long as the mills remained. By a sale of the mills, generally, I should, therefore, incline to think the water would pass as an incident to them, without any special provision. A contrary inference would be against every reasonable intendment. Supposing the water thus diverted, had been the only water to supply the mills, would there have been a doubt as to the intention of the parties? The quantity of water cannot materially alter the case; and, indeed, it was not denied on the argument, but that the appellant had acquired a right to the use of the water, co-extensive with the duration of the mills first built.

But it is not necessary to say, the right to the water passed, as an incident to the mills, in the sense above-mentioned; or, that the appellant acquired this right, at the time he purchased the mills. It was, I think, amply secured by a prior contract; and this will account for the language of some of the witnesses, and the guarded expressions in the respondents' answer.

Anna Barnard, a witness on the part of the respondents, testified, that she was present at the time of the sale, and that *White* sold "his right and interest" in the mills, and delivered up his right to the mill and mill-irons, but does not recollect that any thing was said respecting the waters of the creek. The reason of this, probably, was, because the parties considered

the use of the waters provided for by the former contract, made before the mills were erected. *Hugh White*, in his answer, admits that he sold his shares in the mills, to the appellant, for the consideration of seventy-five pounds, and that the purchase money has been duly paid. But says, "*at the time* of his relinquishing his shares, no mention was made of any right, interest or privilege, in the waters of the said creek, nor was any such right or privilege included *in the said contract of sale, of the said mill.*" With truth, *probably*, he might so declare, because it was not necessary to say any thing on the subject, or include it in the sale, it having been provided for by another agreement. This he does not undertake to deny. He only says, the plan was not matured and carried into effect; by which I understand him to mean, as I before observed, that no writings were entered into; deeming them necessary to mature and perfect the contract.

ALBANY,
February, 1805.

Wetmore
v.

White & White.

I the more readily adopt this construction of this part of the answer, because it reconciles it with the evidence. For, if *White* meant to be understood, that no contract whatever, had at any time been made, respecting the water, he stands contradicted by three witnesses. I consider the effect of this agreement, as an appropriation of the water to the use of the mills; that it thereby became, in some measure, an appurtenance to them; and that, under such circumstances, a grant of the principal subject would pass the water, as an incident.

The next inquiry is, whether this contract vested a permanent, or only a temporary right to the use of

ALBANY,
February, 1805.

Wetmore
v.
White & White.

* *Le Neve v.*
Le Neve.

† *Walton v.*
Hobbs.

‡ *Only v. Walker.*
§ *Arnot v. Bris-*
co.

the water? If I am correct in the construction given to *White's* answer, it is not such a denial of the contract, as to bring it within the rule of equity, making it necessary to establish it, by the testimony of more than one witness. That rule can only be applied to cases, where the answer is a clear and positive denial of the fact. 1 *Vez.* 66.* But admitting the answer to be a direct denial of any contract, respecting the water; I should not consider it, under the circumstances of the case, as coming within that rule. It is impeached by the testimony of several witnesses, and there are other facts and circumstances, corroborating the testimony of *Beardsley* on this subject. 2 *Atk.* 19.† 3 *Atk.* 407.‡ 1 *Vez.* 97.§ If *Beardsley's* testimony is to be received as competent evidence, upon which to ground a decree, under the above rule, it establishes, beyond all possibility of doubt, a permanent right in the appellant to the water, for the use of the mills. *Beardsley* being acquainted with the whole transaction, leading to, and attending the building of the mills, gives a very minute account respecting the business, and declares most unequivocally, that the agreement was, that the water diverted from the main channel of the creek, was to be for the supply of the mills for ever. In this he stands, in some measure corroborated by the testimony of *Leavenworth* and *Wetmore*, who say, that it was agreed, that wherever the mills should be built, there the water should go. The latter declared also, that when *White* sold his right and title in the mills to the appellant, he supposed the use of the water *perpetually* was intended likewise to be sold.

It is said, however, that *Beardsley* has so contradicted himself, with respect to the consideration paid by *Wetmore* to *White*, for the water, that he is unworthy of credit. This allegation, I do not think well founded. In his answer to the appellant's interrogatories, on this first point, he says, that *White* was to have one-fourth part of the mill, on account of his allowing the water to be turned from the main creek, for the use of the mill forever, and for digging, draining and turning the water; and, in consideration of other things mentioned in a certain written contract. In his answer to the respondents' interrogatory, he says, the consideration that *Wetmore* paid *White*, for the use of the water was, that the waters overflowed the lands of *Wetmore*, and that *White* was to have one-fourth part of an acre of land forever, with the mills erected thereon; one-fourth of the grist-mill, and one-third of the saw-mill, and that he supposed the said contract was completely finished and carried into effect.

The latter examination is more full and circumstantial than the former, but is not, I think, so essentially variant, as to discredit the witness. There is, to me, internal evidence arising from the nature of the establishment, and the acts of the parties, fortifying the conclusion, that it was the intention of the parties, that so much of the water of the *Saghquate* creek, as was necessary for the use of the mills, should be permanently appropriated to that object. A contrary conclusion, would lead to great doubt and uncertainty. If the appropriation was considered as coextensive with the necessity that at first existed for mills at that place, its termination would depend upon mere matter of opinion. If, with the duration of the mills first erected, doubts might arise to what

ALBANY,
February, 1805.

Wetmore
v.
White & White.

ALBANY,
February, 1805.

Wetmore
v
White & White.

extent repairs might be made, for the purpose of continuing the old mills; and to say, that they should be suffered to go to decay, without any repairs, would be doing violence to the understanding of the parties. Public accommodation, and private emolument, were probably the primary inducements for building the mills, and diverting the water; the same reasons, for any thing that appears, now exist for their continuance.

The conduct of *White*, in not disclosing to *Wetmore*, at the time of selling the mills, his claim of restoring the water to its original channel, his sleeping so long upon this claim, and permitting the appellant to expend his money, in repairing and rebuilding the mills, were unconscientious, and form strong grounds for the interposition of a court of equity. 2 *Atk.* 83.*

* *East. Ind. Com. v. Vincent.*

It is true, the respondent, *Hugh White*, swears, that he *verily believes*, he apprised *Wetmore* of his claims, before the mills were taken down or destroyed. This, I do not think entitled to much weight. If the fact would warrant it, he ought to have sworn positively, and not merely as to his belief. Besides, it is rendered highly improbable by his acquiescence for five years together. Much was said on the argument, respecting the injury, which the diversion of the water would occasion to the respondents' meadows, and, much of the testimony in the cause was pointed to that object. This testimony is vague, uncertain, and, in my opinion, irrelevant. If testimony of this kind was proper at all, as furnishing a clue to the intent and understanding of the parties, it should have been confined to the time when the contract was made; and on that subject, we have the estimation of *White* himself; for it appears, from the testimony of *Beards-*

ley, that he considered the water of so little use to him, and the establishment of the mills so unpromising, in point of profit, that he offered to give the appellant and *Beardsley* the use of the water forever, together with a barrel of pork, if they would build a grist-mill and saw-mill alone, and he to have no concern with them.

The appellant's claim, resting altogether upon parol contracts, it becomes necessary to examine, whether any obstacle to relief is interposed by the statutes for the preventions of frauds. I think there is not. It is an established rule in equity, that a parol agreement, in part performed, is not within the provisions of the statute. 1 *Fonb.* 182, and the cases there cited. 3 *Atk.* 4.* To allow a statute, having for its object the prevention of frauds, to be interposed in bar of the performance of a parol agreement, in part performed, would evidently encourage the mischiefs the legislature intended to prevent. Money laid out in improvements, is considered a part execution of a contract. *Pow. on Contr.* 296. So, also, possession, delivered in pursuance of an agreement, is such a degree of performance, as to take a contract out of the statute. *Ibid.* 299. Payment of the consideration money, has always been held as a part performance. 3 *Atk.* 4.†

The case before us, I think, clearly falls within these rules. The consideration money has been paid, possession taken, and valuable improvements made. I can therefore see no objection against granting the appellant such relief, as will quiet him in the permanent enjoyment of the water, for the use of the mills, to the extent the same was used and enjoyed, at the time he purchased them from the respondent, *Hugh*

ALBANY,
February, 1805.

Wetmore
v
White & White.

* *Lacon v. Martins.*

† *Lacon v. Martins.*

ALBANY,
February, 1805.

Smith
v.
Williams.

White. This is sufficiently certain and definite, for a decree for a specific performance.

I am, therefore, of opinion, that the decree of the court of chancery ought to be reversed.

Judgment of reversal unanimously.

Paschal N. Smith *against* Daniel Williams.

An owner of a ship bottomed for more than her value, has not an insurable interest in her. Judicial acts of foreign tribunals are *prima facie* to be deemed correct; therefore, no inference to be made against them.

IN error on a bill of exceptions, tendered and sealed at the trial of a cause upon a policy of insurance, on the body of the ship *Prosper*, in which, *Williams*, the now defendant, was plaintiff below. The case, as stated in the 2 *New-York Term Reports*, from the first to the fourth page inclusive, is accurately detailed, in all respects but one. It is there mentioned, in page 4, that the vessel sold under the attachment for \$8,400, instead of 38,500 reals of vellon. In the opinion, however, of *Thompson, J.* page 19, the sums are correctly specified.

The error now relied on was, that the judge at *nisi prius*, in conformity to the decision of the Supreme Court, ruled the now defendant to have an insurable interest in the vessel, to the extent of the sum he paid for her, though she was then bottomed for a larger amount, and that, unless he, at the time of effecting the policy, knew of the lien upon her, he had a right to a verdict for the value insured, after deducting the price at which the vessel sold.

THOMPSON, J. assigned the reasons of the determination, as they are given in 2 *New-York Term Reports*, 19, 20, 21.

Harison, for the plaintiff. The question now before the court is, whether a man buying a vessel, bottomed for more than her value, has an insurable

interest? Where a ship is hypothecated, an owner can insure only his surplus interest, beyond the amount of the lien. Here he had none. His being a *bona fide* purchaser, does not alter the question.— He takes the title of his vendor, and stands exactly in his situation. Therefore, as to the effect of the bottomry, *Delavigne* and *Williams* are to be considered as one person, and the property equally affected by the lien, whether in the hands of one or the other. It is like the common case of a purchase of a chattel from an apparent owner. The vendee, unless it be sold in a market overt, takes it subject to the rights of third persons. The defendant, therefore, could acquire no greater interest under the sale, than that which *Delavigne* could dispose of; that is, the surplus value beyond the hypothecation. To the extent of the bottomry bond, the holder of the bond is owner of the vessel; and herein it differs from a mortgage.— This will appear by adverting to a bottomry bond, which is, in effect, a species of insurance, nay, its twin-brother. In the former, the money is advanced before the loss; in the latter, after. In either case, the original owner is, in case of accident, equally secure, as the money is not, like a mortgage, to be returned. By payment of a loss, an insurer becomes a purchaser; so, on a bottomry, which is nothing more than an anticipated insurance, the lender, on making the advance, acquires the property to the amount of the money he pays. Consequently, the original owner cannot have any interest, excepting that which remains beyond the extent of what he borrows. It follows, therefore, that he should not be permitted to insure more than that excess. A


ALBANY,
February, 1805.

Smith
v.
Williams.

ALBANY,
February, 1805.

Smith
v.
Williams.

contrary doctrine would be to tolerate double insurances, and open a wide door to fraud. A man may take up two-thirds of the worth of his ship on bottomry; if he may also cover, by an insurance, her full value, he would, in case of a loss, put into his pocket, the two-thirds he had borrowed. This would be a temptation to dishonesty. Reason and policy, therefore, require, that only the excess of value beyond the sum for which a vessel is bottomed, should, in the original owner, be deemed an insurable interest. For the lender of the money advanced, is, to the extent of the loan, the actual owner. In cases of jettison, he is bound to contribute. 2 *Val.* 19. 2 *Emer.* 504, citing *Le Guidon*, ch. 19, art. 5. This, it may be said, is the law of *France*, but that the rule in *England* is different. It is not, however, on that account to be preferred by us. The doctrine, from the authorities cited, is that of the general commercial code, drawn from the oldest books in the world, and resting upon the sanction of various nations in all ages, not upon the maritime ordinances of any particular country. For, if the vessel perishes, the lender on bottomry must be the sufferer; if she be saved, he will be the gainer, and he ought, then, to contribute, which can be only as owner. As a species of double insurance, the policy now before the court is necessarily void. 2 *Val.* 61. 1 *Emer.* 236, 7. For, on a contract which is purely one of indemnity, a clear and certain gain of the sum insured, can never be allowed to take place. It is not correct to argue, that the insurance will be void or not, according as the fact of the bottomry was, or was not known to the insured. Ignorance, in many instances, furnishes no pretext for

ALBANY,
February, 1805.

 Smith
v.
Williams.

upholding the policy. If a vessel be not seaworthy, the insurance will be void, though it was not known that she was so. Because, the concealment of a material fact, though innocently done, vacates the agreement, it being the duty of the insured "from motives of common prudence, to inform himself of every fact and circumstance, which may throw the smallest light on the nature and perils of the proposed adventure." *Marsh.* 347. *Millar*, 40, 41, 46, 47, 97, to the same point. It is necessary, now, to proceed to another foundation of the law of insurance, which presents to the recovery an obstacle, which, it is conceived, is insurmountable. Every policy *bona fide* effected, contains an implied engagement, that, in case of abandonment, the underwriter shall be entitled to receive the subject matter. It is an essential part of the contract, that the benefit of abandonment shall be saved to the insurer. Otherwise, a loss not absolute in itself, but a mere technical total, on which two-thirds may be recovered, would be totally lost to the underwriter. Tested by this rule, the policy, now litigated, fails in an essential ingredient. The bottomry, though latent and unknown, destroyed that right to the property on abandonment, which was the basis of the insurer's undertaking, and therefore avoided the policy. Any thing which takes away from the underwriter those rights, on having of which he is supposed to have entered into the contract, vacates the agreement. A previous direction not to pursue one of three routes, on a voyage, where it was usual to leave the whole three to the discretion of the captain, was held to prevent a recovery, because the underwriter made his calculation, on

P

ALBANY,
February, 1805.

Smith
v.
Williams.

the advantage of the captain's judgment as to all.—
Middlewood v. Blakes, 7 D. & E. 162. The same principle ought to govern on the present occasion.

Riggs and Benson, contra. Though the position, that a purchaser of a chattel takes it liable to all the incumbrances which affect it in the hands of the seller, were correct, still it may have further exceptions, than the one arising from a sale in market overt. Liens may become invalid from the *laches* of the persons who hold them. As to markets overt, what are they in this country? Streets, for wood and hay, and other articles. Shops and warehouses, for goods. Wharves, for ships. If property is entrusted to another in such a manner that he *may* dispose of it, a *bona fide* sale is good. It is incumbent on the holder of a bottomry bond to take possession of the vessel on her arrival at her first port. If he do not, it is a waiver of his lien, and the vessel, in the present instance, being *bona fide* sold in a market overt, for such a wharf must be considered, the title of the purchaser is good against all the world. It is contended, however, that he who borrows on bottomry, has not in his vessel, any insurable interest, except for her surplus value beyond the sum taken up. There is no such rule in our law, nor in that of *England*, for none such can subsist. Suppose an owner of a ship in a foreign port, bottoms her for a sum, which he lays out in masts, yards, and repairs, to enable her to prosecute the voyage; is not the vessel enhanced in value by so much as is thus actually converted into ship? and cannot the owner insure that, into which the money is thus changed? It is true, the lender on hypothecation,

ALBANY,
February, 1805.Smith
v.
Williams.

has but a special insurable interest, which he is bound to particularize. Therefore, that of the owner remains as before. The doctrine of double insurances does not apply to this case. It supposes the insured to have been the borrower of the money. That is not so here; for the defendant, *Williams*, knew not it was taken up. That the security was not by way of mortgage, if it makes any difference in the question, operates in our favour. For a mortgage passes a legal interest in the subject. Bottomry does not; it only gives a right, if exercised in due time, of going into court and obtaining process against the vessel. The difference is the same as between judgments and mortgages. The first give a lien, but no interest, which is to be acquired only by legal proceedings, instituted upon them. But even in the case of an absolute assignment of a ship, if in the nature of a mortgage, the mortgagor is deemed the legal owner; liable for the necessities and repairs of the vessel, and, until possession taken by the mortgagee, he alone is entitled to sue for the freight earned. 1 *H. Black.* 117 (n.)* Can it, then, be said, that the mortgagor has not an insurable interest? If so, why has not the contract been disaffirmed, and the premium returned? It has been urged, however, that the right to have the benefit of the property abandoned, has been lost to the insurer, and therefore the policy is void. Taking it for granted, as has been insisted, that the now defendant, acquired by his purchase no title, but what was subject to the lien on the vessel, as he was a *bona fide* purchaser, he had a recourse against the vendor, and on abandonment, that recourse passed with the vessel to the insurer. Besides, the idea of this loss of

* *Chinnery v.*
Blackburne.

ALBANY,
February, 1805.

Smith
v.
Williams.

the property insured, proceeds on the supposition that the *Consulado* in *Spain* rendered a proper judgment. This we deny, for we contend that the lien by the bottomry was gone, upon the vessel's sailing from the port of her first arrival. The lender should have followed the ship, demanded his money, and on refusal, have applied to the admiralty for process against the vessel. It is not, however, true, that the property has been lost to the underwriter. He gets the amount, of what it sold for, deducted; and, therefore, obtains the full benefit of the abandonment.

Harison, in reply. To make our streets and wharves, markets overt, they should have clerks, and records of the sales made in them. Those are the ingredients required by law. There is nothing, therefore, shown to do away the position, that the defendant's title could be no better than his vendor's. If so, he had no interest, but in the surplus, beyond the amount of the bond. Laying out on the vessel, whatever is raised on bottomry, does not increase the interest of the borrower. For it is at the expense of the lender. His money, not that of the insured, has, in case of loss, been expended. To sanction, therefore, the present policy, would be in fact to authorise double insurances. It is a mistake to imagine there ought to have been a return of premium to justify a resistance to the suit, or rescind the contract, as it is called. In cases of non compliance with warranties, the premium is not always returned, though it may be recovered in the very action, where the policy is declared to be void. We trust, therefore, a *venire de novo* will be directed.

Per curiam, delivered by *Lansing*, chancellor. It has been admitted by the parties, and it is so stated in the bill of exceptions in this cause, that the defendant was entitled to have recovered in the court below, if the interest intended to be covered by the policy was insurable.

ALBANY,
February, 1805.

Smith
v.
Williams.

It has also been admitted in argument, that the intent of the parties, *deducible from the policy*, was to constitute it an interest, and not a wager policy, and the only questions on which the opinion of the court is required; are, 1st. Whether the interest of the obligee, of the bottomry bond was a valid lien, and such a one as would be enforced by the maritime law? 2d. Whether the vessel in question, being subject to a bottomry bond, greater in amount than its value, was insurable by the defendant, *Williams*?

The only objections which have been urged to the validity of the bottomry bond, as affecting the interests in controversy between the parties, are, 1st.—That it was not enforced in due time. 2d. That as the defendant, *Williams*, was ignorant of its existence, at the time the policy was underwritten, it ought not to vitiate it, as having been made under the impression of mutual error.

As to the objection that the bottomry bond has not been enforced in due time.

The policy appears to have been made on the 13th day of *May*, 1800, on a voyage from *New-York* to *Algiers*, with liberty to touch at *Cadiz*. The ship was purchased in the *November* preceding, by the defendant, *Williams*, of *Casimir Delavigne*, for whom a bottomry bond had been executed on it, *by procuration*, at *Amsterdam*, previous to such sale;

ALBANY,
February, 1805.

Smith
v.

Williams.

but no other circumstance respecting the time when such bond was executed, the voyage described in it, or the port considered as the home port of the ship, as to the bottomry, were offered in evidence.

It, however, appears, that the bottomry bond was given for 6,500 dollars, which is 1,500 more than the valuation of the ship in the policy, and that she was sold at *Cadiz*, by order of the royal *Consulado*, who, it is not contended, had not a competent jurisdiction, and who acted judicially on the occasion.

The judgments of foreign courts, having competent jurisdiction, have always been considered *prima facie*, as binding in the points on which they have expressly adjudged. The period of the inception of the contract, on the voyage which was the object of it, not having been disclosed, for aught that appears, it may, though made at *Amsterdam*, as it was done by *procuration*, have been executed the day before the sale to the defendant, and may have attached to the voyage insured, terminating it at *Cadiz*. The ship was at *New-York*, at the time of the sale, and there is no proof that she left that port, till she sailed on the voyage insured. Hence there is no ground legally to infer a *laches* in enforcing the lien created by the bottomry bond.

If the voyage to *Cadiz*, was the voyage insured, the intermediate transfer to the defendant, *Williams*, certainly could not avoid the bond, or impair the rights of the obligor. For if a transfer, pending the voyage, constituted an avoidance, the lien supposed to be created by the bottomry bond, must be completely in the power of the obligor to defeat, when-

ever it comported with his views. This would lead to consequences too clear to require elucidation.

ALBANY,
February, 1805.

Smith
v.
Williams.

As to the 2d objection. The insurer is a perfect stranger to the subject insured ; whatever relates to it, must be considered as peculiarly resting in the knowledge of the insured, and the law imposes it on him to acquire a competent information respecting it. This is a salutary and well established rule. For how is it possible to determine with unerring certainty, the exact state of intelligence he possessed ? Or what portion of the ignorance he possesses, is to be attributed to his want of exertion, or to his wish of concealment of the latent defects, which may affect his interest ? If he does not possess the full knowledge of every circumstance respecting it, involving the interests of others, it may be his misfortune, but it must legally be imputed to him as a fault.

Every reasonable intendment is to be admitted in support of the judgment of the *Royal Consulado*. The defendant, *Williams*, was on the spot, clothed with the powers of owner and master. He was interested, in the one capacity, to vindicate his right of property ; in the other, as agent for the concerned, to repel any illegal claims : He had an opportunity to make a defence. In all events, if the judgment was examinable, he might have furnished the reasons and proofs to warrant it ; that this has not been done, affords a strong inference that it was not in his power.

The second question is important as it respects the general interests of commerce, and it is peculiarly desirable, that a decision of the court should satisfactorily put it at rest.

ALBANY,
February, 1805.

Smith
v.
Williams.

Whenever the bottomry and the policy are coextensive, as to voyage and time, no collision can arise. If the ship arrives at its port of destination in safety, the policy is satisfied ; but the lien created by the bottomry, still exists. If the ship had been injured by any of the perils insured against, so as to entitle the insured to an average loss, it could not affect the interests of either of the parties to the bottomry bond. But if the ship perishes totally ; or if a technical total loss is sustained before she arrives at her port, the insured would recover, if the policy is valid, without interest. For the value of the ship being covered by the bottomry, the obligee cannot recover the money advanced on it ; his right to it ceasing with the destruction of the ship, or the necessary dereliction of the voyage. To this intent, the obligee in the bottomry bond must, therefore, be considered as owner, for he is to receive nothing, unless the voyage is made.

If the bottomry interest existed before the policy was underwritten, and instead of being limited to the ulterior port of destination, described in the policy, was to be enforced at any intermediate port at which the ship might touch ; or, if the ship was so much deteriorated as to constitute it a technical total loss, at the port of her destination, no abandonment could be made with effect, and the insurers would be entangled in difficulties, which they had no reason to calculate upon, at the time of making the policy.

The policy of insurance, is always considered as a mere contract of indemnity, and the policy of the maritime law, is averse to any devices which may weaken the inducement to exertions, for saving either ship or cargo by the owner, master or mariners, and

operate as an incentive to fraud ; but in the first case put, it would operate to place the value of the property lost by the obligee in the bottomry bond, in the pocket of the insured.

ALBANY,
February, 1805.

Smith
v.
Williams.

We find no express authorities on this subject, in our own, or the British courts ; but if the positions laid down by *Emerigon** and *Valin*,† which have been cited, are to be received as correct, they would fully establish the point, that the value covered by the bottomry is not an insurable interest.

* 2 *Emer.* 386.
396.
† 2 *Val.* 61.

To the objections which have been urged against receiving the law from *Valin* and *Emerigon*, on their authority, it may be observed, that their positions on this subject, appear untinged by local considerations, and if the mind assents to their correctness, there can be no reason for resisting truth, from whatever source it may be derived.

The treatise of *Valin*, is professedly a commentary on the ordinances of Louis XIV. But in illustrating the doctrines they sanction and enforce, it refers to the antecedent usages which had obtained in the several nations of Europe ; the ordinances of the free Imperial, French, Italian and Hanseatic towns ; the city of *Wisbuy* on the *Baltic* ; imperial and royal ordinances ; and, among the rest, some of their principles are said to have been deduced from the ordinances of *Eleanor*,‡ wife of *Henry*, II. king of *England*, then dutchess of *Guyenne*, one of the fiefs held of the crown of *France*, and of consequence, in the spirit of those times, the dutchess was considered as one of its vassals. These ordinances were afterwards confirmed and enlarged, according to the French writers, by her son, *Richard* I. king of *England*, who was also duke of *Guyenne*, and, of course, stood in the

‡ *Conference
de l'ordonnance,
Louis XIV.* 7.

ALBANY,
February, 1805.

Smith

v.

Williams.

same relation to the crown of *France* with his mother. But the *English* respect them as the production of that king. This is merely intimated by way of illustrating the origin of the usages which influence the modern commercial regulations, and the little regard which has been paid to the authority which promulgated them ; for, in this instance, on the foot of authority, they would probably have been indignantly rejected by the *French*, as the act of one of the feudatories of the monarchy.

The laws of *Oleron*, could receive no sanction in *France* ; and, perhaps, not in *England*, from the authority of king *Richard* ; and it has even been doubted, from the language in which they are published, and from the places mentioned in them, whether their object extended beyond the dutchy of *Guyenne*. There were unfavourable circumstances arising from the relative situation of the prince who enacted, and the princes whose subjects received them, to repel their introduction, even on the ordinary ground of public utility and convenience ; and yet it appears, from the French writers, that they are considered as forming part of their maritime code.

The laws of *Oleron*, have been mentioned as a compilation, and probably were so. They must have obtained the authority attached to them, in consequence of their intrinsic worth, and the estimation in which they were held, to regulate the intercourse between the merchants of different nations.

If such their origin, and such the steps in which we trace the progression of these celebrated codes, from ancient to modern times, why should the inquiry whence they originated, be permitted to banish from our country, the well established, salutary usages

of trade, sanctioned by the long experience of the European nations ?

ALBANY,
February, 1805.

Smith
v.

Williams.

The English courts consult the French authors, on general maritime law. *Park* observes, that the ordinances of *Louis XIV.* "are an excellent body of sea-laws, to the merit of which all *Europe* has borne testimony ;"* and he remarks, that they had the good fortune to meet with a laborious commentator in *Valin*, who, he says, "being thoroughly sensible of the advantages, which his country must necessarily derive from such an excellent code, has, with a degree of labour and industry, which excite our admiration, and which are highly deserving of imitation, placed it in the most favourable point of view ; has cleared up every obscurity, by tracing their laws to their ancient sources," &c.

* *Park's, Insur.*
39.

Of *Emerigon*,† he also speaks in terms of high approbation, and of the "*infinite labour, unwearied study and reflection*," with which he had made his collection.

† *Ibid*, 40.

All our laws relative to insurances and bottomry, are derived to us, from similar sources, and I rather think, though I speak only from general recollection, not having examined the point, that few other than restraining statutes exist in *Britain*, respecting them.

This case has been likened to the case of a judgment and mortgage ; but in both cases, though the existence of the lien must necessarily terminate by the operation of a title paramount, or with the destruction of the subject on which it attaches, the debt survives. The right of the holders of those securities, may be more circumscribed by events of that description, as to object, but retain all their energy as to the per-

ALBANY,
February, 1805.

Bloodgood
v.
Zeily.

son and remaining property of the judgment debtor, or mortgagor, and the safety of the property bound by the judgment or mortgage, does not form the essence of the debt: Not so with a bottomry interest, which perishes with the ship to which it attaches.

It will be perceived, that I have not confined myself precisely to the line in which this case has been discussed, or pursued it in the extent to which it was protracted; that I limit my opinion simply to the points, that there is no ground to question the judgment of the royal *consulado*, and that the *owner of a ship, covered by a bottomry bond, to an amount beyond her value*, has not an insurable interest.

I am therefore of opinion, that the judgment of the supreme court be reversed.

Judgment of reversal.

Abraham Bloodgood, *Appellant*,
against
Martinus Zeily, *Respondent*.

If after a mortgage be forfeited, and execution sued out, on a judgment recovered on the bond, a conveyance to secure a portion of the mortgage

THE respondent, by his bill, in the court below, set forth, that in 1783, he purchased from the appellant a farm, then lying in the county of *Albany*, called the *Clabergh*, for which he was to give 450*l*.

That of this sum he paid, on the purchase, 100*l*. in money, be made of other property, redeemable on paying a certain sum at a future day, such conveyance will partake of the quality of the original transaction, and be deemed a mortgage, and not a defeasible purchase; therefore, if after lapse of the day, for repayment, the lands conveyed, be sold to a *bona fide* purchaser, though the purchase will not be impeached, the grantor will be entitled to an account, and the sum at which the land was sold, with interest, will be the amount for which he will be entitled to credit, though he did not demand a redemption, for more than six years after the day of repayment. After a judgment, an execution, and sale under a mortgage bond, the court will not open the account on the mortgage, though there be some degree of irregularity in the accounts, if from the whole, they appear to be fairly closed. *Query*, if an agreement by a mortgagee, who has bought in the mortgaged premises, to divide with the mortgagor, the surplus produce of a resale, after deducting debt and costs, if he will show the best lands, so as to get for the estate a given sum, be a valid agreement; or whether the showing the lands, be a condition precedent; *Query*.

money, 25 skepples of wheat, and 8 *cwt.* of flour, executing, for the residue, a bond and mortgage, dated the 24th of *February*, 1784, being the day after the date of the conveyance to himself. That the appellant having obtained judgment on the bond, sued out, on the 1st of *September*, 1789, a *fi. fa.* directing a levy to be made, for 510*l.* debt and costs, which was accordingly done. That a sale did not actually then take place, because the respondent, on the 19th of the same month, *in order to obtain a longer time for payment*, assigned to the appellant, *as an additional security*, for the money due to him, class-rights for 1400 acres of land, located at the south end of *Cayuga* lake, with a power, authorising him to take out letters patent, in his own name; and the appellant, at the same time, executed to the respondent, by way of defeasance, a bond for 300*l.* conditioned, that if the respondent, his heirs, &c. should pay the appellant, his heirs, &c. 250*l.* within one year from the date thereof, then the assignment of the class-rights should be void. The bill then stated, that the appellant, in *October*, 1790, under an execution issued upon his former judgment, sold the *Clabergh* farm, and having himself purchased it in, directed the sheriff not to sell the personal estate of the respondent, as he, the appellant, was fully satisfied. That immediately after, the appellant declared to the respondent, he knew of two persons, who were desirous of purchasing the farm, which he meant to sell, for 500*l.* and therefore, requested the respondent to show them the best lands, it being his intention to divide with the respondent, the surplus which might arise after payment of debt, interest and costs; therefore, to avoid the expense and trouble of a deed from

ALBANY,
February, 1805.
Bloodgood
v.
Zeily.

ALBANY,
February, 1805.

Bloodgood
v.
Zeily.

the sheriff, the respondent, at the instance of the appellant, conveyed the farm to him, in consequence of which, he entered into possession, and sold the property for 500*l.* to one *Henry Effener*, to whom the respondent had, by the appellant's request, shown the estate. That letters patent had been obtained by the appellant, in his own name, for the class-right lands, which were worth 4,000*l.* The bill then set forth the usual application for a settlement, offering to allow all reasonable costs, &c. if the appellant would account for the proceeds of the sale to *Effener*, and reconvey the 1400 acres, which it concluded, by praying to be decreed.

The appellant, by his answer, admitted the purchase of the *Clabergh* farm, its subsequent sale, under the execution, and his buying it in, as alleged; but the sum directed to be levied, or the amount precisely due, he could not, he said, recollect. He acknowledged also, the assignment of the class-rights, his taking out the letters patent in his own name, the executing to the respondent, the bond for 300*l.* conditioned as set forth, and selling the farm to *Effener*; but he insisted the assignment of the class-rights, to have been in consideration of 100*l.* therein expressed, and denied that it was made as a security, for payment of the debt due on the bond and mortgage; or, that he had any communication with the respondent, after the sheriff's sale, or requested a conveyance; on the contrary, he averred, that he received a deed from the sheriff, dated the 12th *September*, 1791; though he acknowledged to have sold in 1796, the 1400 acres of class-rights, to *Simeon De Witt*, esquire, for 500*l.* which was the highest price that could then be obtained.

On the nature of the assignment of the class-rights, whether it was a defeasible purchase, or merely an additional security, as both parties relied on the facts in the bill and answer, neither examined any witnesses. To show, however, an adequacy of price, in the consideration stated in the answer, the president of the senate was interrogated, and he deposed, that in *September*, 1789, the value of class-rights was from 5 to 10*l.* per 100 acres. That in 1790 and '91, he located 13,000 acres, for about 2 shillings per acre. That in 1792, he purchased, for 100 dollars, a lot of 600 acres, more valuable than the class-rights in question, and on which they adjoined.

ALBANY,
February, 1805.

Bloodgood

Zeily.

To establish the sum due on the *Clabergh* farm, at the time of its sale, the agreement to divide the surplus, after satisfying the appellant, the subsequent purchase by *Effener*, and the liability of the appellant, to account for the value, two witnesses were, together with *Effener* himself, examined.

The two first deposed, they were present when the property was sold by the sheriff; that the appellant acknowledged, his original demand was only 500*l.* from which were to be deducted some payments received; one to the amount of 100*l.* which had not been credited. That the appellant further said, if the respondent would show the best lands, so that 500*l.* might be obtained on the resale, he should have the whole amount of what might remain, after discharging debt and costs.

Effener testified, that the respondent, in consequence of a written request from the appellant, showed him the *Clabergh* farm, of which he became the purchaser, for 500*l.*

Upon these facts, his honor, the chancellor, decreed, "that the accounts between the parties, re-

ALBANY,
February, 1805.

Bloodgood
v.
Zeily.

lating to the mortgage, remained closed, the mortgage being satisfied: but inasmuch as it had not satisfactorily appeared to the court, whether the 100*l.* proved to have been paid by the complainant, to the defendant, was the consideration expressed in the assignment of the class-rights, for 1400 acres, or another sum of money; and inasmuch as that assignment was considered by the court, as an additional security for the money payable on the mortgage, and made for no other purpose or intent, and inasmuch as the defendant has admitted, that he procured letters patent for the 1400 acres, which he has since disposed of; and as the court was not fully advised, to what measure of compensation the appellant was entitled for the 1400 acres; his honor directed, that it be referred to a master, to ascertain, when and in what manner the 100*l.* was paid to the complainant; what was, on the 1st of *December*, 1792, the value of the said 1400 acres, and what their value on the same day, in the year 1796, and that a master examine *Effener*, whether, at the time he delivered the written request mentioned in his deposition, to the complainant, or at any time afterwards, the complainant showed to him the mortgaged premises, or any, and what part thereof; and that the said master report the proofs taken in the premises, and his opinion thereon, and that all further directions be reserved, until such report shall be made." From this decree, the case now came up, on appeal, and the chancellor thus assigned his reasons:

Mr. *President*. On this case, three questions arise. 1st. Whether the respondent is entitled to an account? 2d. Whether, to the surplus of the production of the sale, by the appellant, after satisfying

debt and costs? 3dly. Whether to a conveyance for the 1400 acres located, and granted to the appellant, or, a compensation for them?

ALBANY,
February, 1805.

Bloodgood

v.

Zeilv.

As to the first question, the parties have not made out what was the consideration money agreed to be paid, on the purchase of the farm in question. The respondent alleges, it was 450*l*. The appellant, in his answer, declares he does not recollect it, and the deed imports it to be 410*l*. The respondent alleges, that 100*l*. some wheat and flour, were paid on account, and the mortgage taken for the residue.

The mortgage is also for 410*l*. It is, therefore, evident, from the written transactions of the parties, that the sum due on the 24th day of *February*, 1784, the date of the mortgage, was 410*l*. ; and though the respondent's allegations are not otherwise to be regarded, if not admitted or verified, than as limiting his claim, if they are admitted to that intent, it appears from his own showing, that the money, wheat and flour, alleged in his bill to be paid in satisfaction of the consideration money, were paid prior to the execution of the mortgage, and, therefore, cannot be received as a credit, on the debt secured by it.

There is no other allegation in the bill, of a payment made on the part of the respondent, though one of the witnesses swears, that at the time of the sale, the respondent alleged, and the appellant admitted, that a credit had been omitted of 100*l*. ; and the subsequent declaration of the appellant, that he was satisfied with the product of the sale of the farm, and his direction to stay the sale of the personal property of the respondent, appear to have been prompted by the admission of such payment.

R

ALBANY,
February, 1805.

Bloodgood
v.
Zeily.

This is strongly corroborated, by the result of the calculation of the amount of the principal and interest, payable on the mortgage, and the amount of the monies admitted to have been paid in satisfaction, from which it appears, that at the time of the sale, a sum, somewhat exceeding 100%. beyond the production of the sale, was necessary to satisfy the appellant.

Both parties seem to have conceded, that the debt was satisfied, and the respondent has not pretended that it was overpaid; though, from the irregular mode in which the business was conducted, the precise manner in which it was effected, cannot be satisfactorily developed, nor does it appear to me necessary to attempt it; for there is ground, in my opinion, to consider the account respecting the mortgage as closed, excepting only as to one item, which requires some further examination.

The 100%. which the respondent alleged he had paid, and the appellant admitted to have been paid, rests merely on those declarations, made at the time of the sale of the farm. No receipt has been produced; no circumstance disclosed, from which the time and manner of the payment can be collected. Connecting these considerations with the manner of adjusting the class-rights, some doubts are excited in my mind, whether the 100%. so paid, is not the sum described as the consideration money in the assignment of the class-rights.

To elucidate this point only, and not to open the account on the mortgage, I think it a proper object of reference to a master.

As to the second point. Whether the respondent is entitled to the difference between the purchase and sale price of the farm?

Here the respondent has limited his demand, by his bill to one half; the evidence would entitle him to the whole, if to any thing.

That the appellant promised, that he would divide such difference with the respondent, is not positively denied by the appellant in his answer; and, it has been proved by two witnesses who were present, and swear to the conversation. But they declare that the promises were made on the condition, that the respondent should show "*the best of the land*," to persons disposed to become purchasers, so as to enable him to sell it at 500*l*. It is proved that the appellant sold the land for 500*l*. But though there is proof, that the appellant required the respondent to show the farm, by a letter delivered to him, by *Henry Ffener*, the person who afterwards purchased it, there is no evidence of a compliance with that request.

The result expected to be produced by the respondent's showing the farm, was actually produced *by the selling it for 500*l*.*; but it is not ascertained whether he did, or did not perform the act, which entitled him to the benefit of the appellant's promise. If he did not, I can discover no ground, on which I can decree its performance, for the showing the land, was in the nature of a condition precedent. The delivery of the letter containing this request, and the subsequent purchase of the farm, by the bearer of it, for the sum fixed by the agreement, I think, however, raises that kind of presumption that the service was actually performed, which will warrant a further inquiry out of the ordinary course; I therefore, also, re-

ALBANY,
February, 1805.

Bloodgood
v
Z. ily.

ALBANY,
February, 1805.

Bloodgood
v.
Zeily.

ferred it to the master to inquire, whether the respondent showed the farm to *Henry Effener*, in consequence of the letter, or at any other time before, or after it was written.

I further stated, Mr. President, that I should have no objection, on the coming in of the report on this subject, to hear the parties, on the regularity of this last point of reference, if either of them, from its nature or object, supposed it not in strict unison with the course of proceeding in the court below.

As to the third point. I have little doubt, that the assignment of the class-rights, was made under the pressure of an execution without an advance of money on account of the purchase ; for the appellant does not pretend it in his answer, and the nature of the transaction forcibly repels any presumption arising from its acknowledgement in the assignment. But whatever the intent, all the circumstances attending it indicate, that, equitably construed, it can only be considered as an additional security. The bond speaks a plain language. It contains a clause in the condition, that if 250*l.* were paid in one year, that then, not only that bond, but the assignment should be void. It was coupled with a forbearance for one year, and for this forbearance, 150*l.* was exacted, beyond the legal interest, if the respondent should have it in his power to redeem, at the expiration of that period. I am, therefore, very clear, that the doctrine of conditional purchase-right is wholly inapplicable, and that the appellant ought to respond for the 1400 acres of land located.

If this land had not been alienated, the appellant having become a trustee, for the respondent, so soon

as the grant to him was perfected, a conveyance of it to the respondent, would, I think, under the circumstances of this case, be a thing of course. But the appellant alleges that he has sold it; and, as it is not pretended that Mr. *De Witt*, the grantee, had notice of the trust, the conveyance to him must be considered as valid, and hence it may become a question of some difficulty, what ought to be the measure of compensation.

ALBANY,
February, 1805.

Bloodgood
v
Zeily.

As then advised, I incline to think, that the period at which the land ought to be valued, was the time of the demand, which is stated to have been in 1796, though the sale was made in 1792.

Without, however, giving an opinion on this subject, I ordered it to be referred to a master, to ascertain what was the value of the 1400 acres of land, at both those periods, but if any improvements had been made thereon, exclusive of such improvements and the sum expended by the appellant, in obtaining the letters patent therefor.

The question respecting the validity of a sale of an equity of redemption, which was urged in the course of the argument, is settled, I conceive, by the respondent's own showing, that he confirmed the sale by a subsequent conveyance.

Lush, for the appellant. This case presents two questions. 1st. Was the respondent entitled to one half of the surplus, if any, on the sale to *Effener*, of the *Clabergh* farm? 2d. Was the conveyance of the class-rights, a defeasible purchase, or a mortgage?—On the first point, it is evident, there was no surplus in fact. A short statement will show this.

CASES IN ERROR IN THE

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| ALBANY, February, 1805. | February 24th, 1784, there was due | - | 410 <i>l</i> . |
| <u>Bloodgood</u> v. <u>Zeily.</u> | Interest to the 19th September, 1789 | - | 159 <i>l</i> . 18 |
| | Due the appellant on that day | | 569 <i>l</i> . 18 |
| | Deduct then paid | - | 100 <i>l</i> . |
| | Balance remaining | - | 469 <i>l</i> . 18 |
| | Add interest from thence to the day of sale | | 31 <i>l</i> . |
| | Poundage and costs | - | 17 <i>l</i> . |
| | Due on the Clabbergh farm when sold | | 517 <i>l</i> . 18 |

It is, therefore, clear, then, that the above sum, and not 374*l*. only, was justly owing to the appellant, when the property was brought to sale. The price, therefore, paid by *Effener*, could not yield a surplus. But allowing that there was one, still the appellant would not be bound to pay it over. His declarations, that are now relied on, and endeavoured to be turned against him, were made in the unsuspecting goodness of his heart, and without any consideration. They amounted to nothing, and can be considered but as a *nude pact*. It may be said, that a very trifling thing will be sufficient to raise a consideration, and for this, the authority of 1 *Pow. on Cont.* 342, 3, may be cited. But he does not seem to have apprehended the cases to which he refers.— They merely establish, that where a consideration has passed, a very little will amount to an acknowledgment. Thus, in the decision from *Croke*,* A. demised to B. and B. assigned to C. who promised A. to pay the rent due, if he would produce to him the deed by which it was reserved. A. showed him the deed, and held that he was bound. So in that from *Dyer*,† the defendant had received 50*l*. from the debtor of the plaintiff, and when called on for it,

* Sir Anthony
Sturlyn v. Albany,
Cro. Eliz.
67.

† 272 b. n. (32)
Gilbert v. Kudeard.

said he was not at leisure, but would pay it at another day. To make a contract valid, both parties must be bound. Here the respondent was not, for he never assented. Upon this principle, therefore, the contract was null, and though a surplus had arisen, it could not have been recovered.

ALBANY,
February, 1805.

Bloodgood
v.
Zeily.

The mere inspection of the assignment, is sufficient to determine the second question, and evince it not to be a mortgage. It has not one single feature belonging to such instruments. There is no loan of money in it; no stipulation for repayment; no covenant; no remedy upon it. These are necessary ingredients, to create a mortgage. The first is peculiarly essential. A defeasance cannot be presumed; for the *English* practice on this point is unknown to us. Nothing can be argued from its not appearing that the assignment was ever recorded; for, when it was executed, class-rights were *choses* in action. There is one circumstance, which seems conclusive in ascertaining the nature of the deed. The appellant was empowered to take out the letters patent, in his own name, and thus enter on the land. Had the instrument been intended to operate as a mortgage, this would not have been done; for under that species of security, the mortgagor always remains in possession. This departure from general usage, shows a mortgage was never intended. The determinations in *Jason v. Eyres*, 2 Ch. Ca. 33. *Howard v. Harris*, 1 Vern. 33. *Willett v. Winnell*, *ibid*, 488, and *Jennings v. Ward*, 2 Vern. 520, which may be adduced, as strong cases of redeemability against the tenor of deeds, do not apply. They only settle the rule of, once a mortgage, and ever a mortgage. But *Cotterell v. Purchase*, Ca. temp. Talbot, 61, goes the

ALBANY,
February, 1893.

Bloodgood
v.
Zeily.

whole length of the case before the court. It was there held, that an absolute conveyance, accompanied with possession, will not easily be presumed a mortgage, though there be an incongruous covenant in it. In *Ensworth v. Griffith*, 1 Bro. Pa. Ca. 149, a purchase of an equity of redemption by a mortgagee, though accompanied with a written memorandum of an agreement to permit a redemption, was, after a lapse of the day, ruled to have become absolute, and principally on account of the full worth of the estate having been paid. This circumstance is exactly analogous to the ground of the appellant's claim. *Barrell v. Sabine*, 1 Vern. 268, shows the distinction between a conditional purchase, and a mortgage. The first requires a strict adherence to the day limited for the repurchase, because lending and borrowing, is not the basis of the contract, and, therefore, though the value of the property was greatly enhanced, and there was a clause to restore, on repayment, on the day appointed, the court refused to direct a reconveyance, as the sale was absolute. The same principle is found in *Floyer v. Lavington*, 1 P. W. 268. But the case most like the present, is *Tasburgh v. Echlin*, 4 Bro. Pa. Ca. 142. There, the sum of 200*l.* lent on a proviso, similar to that in the assignment of the class-rights, was, merely because there was no covenant for repayment, held to be a conditional purchase, and a redemption denied though the value of the estate was 900*l. per annum*, and the lender had himself filed a bill, praying a redemption, or foreclosure.— With this train of adjudications, therefore, in support of the appellant's title, there can, it is presumed, be little doubt of a reversal.

ALBANY,
February, 1805.Bloodgood
v.
Zeily.

Van Vechten, contra. The agreement to divide the surplus, that might be produced from the sale of the *Clabergh* farm, is proved by the testimony of two witnesses. It remains, therefore, only to show that there was a consideration for such agreement, and that a surplus did arise. To create a sufficient consideration, the mere showing the lands would suffice, and *Effener* himself proves that it was performed. In support of there being an actual surplus, we have only to advert to the declarations of the appellant himself. When the land was struck off to him in *October*, 1790, for 340*l.* he acknowledged himself to be satisfied, and he afterwards sells for 500*l.* This, then, must have left a surplus, of the half of which, he instantly became, under the agreement, trustee for the respondent, and of course, liable to account. As to the assignment of the class-rights, the circumstance of its being given under the pressure of an execution, merely to have a further indulgence, shows it to have been no more than a further security for the original debt; and redeemability, of course, a necessary incident. The defeasance with which it was accompanied, still further elucidates this idea, and corroborates our position. It is a settled principle, in equity, that every contract for the securing of money is a mortgage.— 1 *Pow. on Mort.* 146. Therefore, though the condition of a mortgage be to redeem during the life of the mortgagor, the heir will be entitled to redemption. *Kilvington v. Gardner*, 1 *Vern.* 192. Absolute conveyances, accompanied by defeasances, in separate deeds, are, by our statute,* considered as mortgages, and directed to be registered as such.

* Act concerning
mortgages.

ALBANY,
February, 1805.

Bloodgood
v
Zeily.

1 *Rev. Laws*, 481, *sec. 3*. The case of *Manlove v. Ball and Bruton*, 2 *Vern.* 84, goes the whole length of the one before the court. There, in consideration of 550*l.* an absolute conveyance was made of a church-lease for three lives. The grantee executed a separate instrument, by which he agreed, on payment of 600*l.* within a twelve-month, to reconvey. The 600*l.* were not paid. Yet a redemption was allowed after the expiration of near 20 years, and though the defendant had twice renewed the lease, on the dropping of two of the original lives. The mere lapse of the day of payment never works any injury, where there was an original redeemable interest. *Exton v. Greaves*, 1 *Vern.* 138. *Croft v. Powel*, *Com.* 603. Even a fine and non-claim for five years, creates no difference. *Rowell v. Walley*, 1 *Ch. Rep.* 218. *Welden v. Duke of York*, 1 *Vern.* 132. In *Stanhope v. Thatcher*, *Prec. Ch.* 435, an estate-tail created for the security of a sum of money, and even the fee subsequently acquired by a recovery, were held, in equity, to amount only to a mortgage, and defeasible on payment of the money due. In viewing this case it is to be remembered, that redemptions are favoured, and defeasible purchases discountenanced. *Howard v. Harris*, 1 *Vern.* 191. The appellant might have treated the assignment as a mortgage. It must, then, be equally so with respect to the respondent; for it cannot be a mortgage on one side only.

Henry, in reply, insisted, that however good such an agreement as that to divide the surplus of the *Clabergh* farm might have been, if assented to, it could not prevail between the respondent and appel-

lant; because the former, by refusing to reconvey, and driving the latter to the necessity of receiving a sheriff's deed, had destroyed all mutuality. To establish no surplus, he relied on the statement made by his associate counsel in opening. He admitted the general rule, as to the redeemability attached to mortgages, but contended that defeasible purchases were an exception to it, as they did not rest on a borrowing and lending, and the mere agreement to permit a repurchase, of such an interest as a class-right, which was only a *chose* in action, could not, he said, operate as a mortgage.

Per Curiam, delivered by KENT, Ch. J. It will not be requisite to recapitulate minutely the facts in the cause, but I apprehend it will be sufficient to state the points that have been raised for our consideration, and to apply the material facts to those points, as we proceed to discuss them.

The appellant contends that the decree is erroneous. 1st. In making the proceeds of the sale of the *Clabergh* farm any basis for an account; and, 2d. In allowing the respondent a right of redemption as to the assignment of the class-rights, for 1400 acres of land.

1st. The accounts between the parties relative to the bond and mortgage, do not appear to have been kept with much regularity or precision, and it would be difficult, from the facts before us, to make an accurate liquidation of those accounts. Nor do I think it necessary so to do, for I agree with the court below, in the propriety of considering the accounts relating to the mortgage as closed, and that the mortgage is to be considered as satisfied. It is equally needless to determine, whether the agreement to

ALBANY,
February, 1805.

Bloodgood
v
Zeily.

ALBANY,
February, 1805.

Bloodgood
v.
Zelly.

divide the surplus monies arising upon the sale of the farm (if any such agreement was made) be valid and binding upon the parties, for I am satisfied there were no surplus monies to divide. The balance due upon the bond at the time of the sale must have amounted to 500*l.* and upwards, the sum at which the farm was afterwards sold to *Effener*, and that, too, after allowing as a credit, the sum specified, as the consideration of the assignment of the class-rights. With respect to that consideration, I think it clear, that it was not created by the advance of cash from the appellant to the respondent. The answer of the respondent does not pretend it was, and this must be the sum which the appellant, at the time of sale, admitted, ought to have been credited on the bond. The assignment, therefore, of the class-rights, must have been taken by the appellant, as equivalent to the payment of 100*l.* upon the bond.

This brings me to the consideration of the second point. Whether the respondent be entitled to redeem? I consider the assignment of the class-rights as being intended by the parties to operate as the payment of 100*l.* on the bond and mortgage. It was not given, or accepted, absolutely as cash, but as a security for the payment of so much of the antecedent debt, and, therefore, I entirely agree with the chancellor, that it is not to be considered in the light of a defeasible purchase, but as an additional security for a part of the pre-existent debt, and to which the right of redemption was necessarily attached. I entertain a full persuasion that this is a just solution; the real truth of the transaction. The internal evidence of the case is, to my mind, conclusive as to the fact. I have no doubt that this mode

of securing the payment of 100*l.* in part satisfaction of the execution, was the cause why proceedings under the execution, were stayed from *September*, 1789, when the assignment was made, until *September*, 1790, when the respondent made default in the redemption of his class-rights. I am of opinion, therefore, that a right of redemption most justly and equitably attaches to this case.

ALBANY,
February, 1805.

Bloodgood
v.
Zeily.

The few cases that are to be met with, of defeasible purchases, and in which the equity of redemption is said to be destroyed, after the limited time, by agreement of the parties, are cases in which there was a great lapse of time between the forfeiture and the application to redeem. *Floyer v. Lavington*, 1 *P. Will.* 268. *Ensworth v. Griffith*, 1 *Bro. Pa. Ca.* 149. *Tasburgh v. Echlin*, 4 *Bro. Pa. Ca.* 142. 1 *Pow. on Mort.* 4 *Ed.* 169 to 184; and Mr. *Powell* admits, in page 183, that the intention of the parties must be clearly proved, or necessarily implied, otherwise they will not be taken out of the operation of the general rule. The intention of the present parties, is so far from appearing to make this assignment a defeasible purchase, as contradistinguished from a collateral security for a debt, that it is manifest, from a review of the case, that the assignment was made to secure 100*l.* as part of the bond, and by that means the respondent obtained the indulgence of another year to meet the execution.

My opinion, therefore, is, that the decree is correct, in attaching the right of redemption to the interest assigned, but as the 1400 acres have since been sold by the appellant, and, as we must intend, to a *bona fide* purchaser without notice, the only

ALBANY,
February, 1805.

Bloodgood
v.
Zeily.

question is, as to the measure of compensation which the respondent is entitled to receive.

It will be perceived, from the view I have taken of the transaction, that the respondent is not entitled to redeem, without paying to the appellant the 100*l.* with interest from the date of the assignment. That sum, therefore, must be deducted, from the amount of his compensation. The only point of any difficulty, is that of settling the time at which the value of the 1400 acres, is to be computed. If the appellant had retained the lands till 1796, when the respondent demanded a release of them, he would have been obliged to restore the lands, or their *then* value, exclusive of improvements; but he had previously sold them to a third person for 500*l.* which he states to have been the highest price which could be obtained, and that when he sold them, he did not suppose the respondent had, or pretended to have, any claim to the lands. As the respondent assigns no reason why he lay by till 1796, I incline to the opinion, that, under the circumstances of this case, the price that the appellant procured for the lands, would form the most equitable rule of computation. He appears to have sold the lands, under a belief that they were absolutely his.

My opinion accordingly is, that the appellant be decreed to account to the respondent for 500*l.* being the sum for which he sold the 1400 acres, together with interest from the time of the sale, which was on the 1st *December*, 1792, and costs both in this court and the court below, and that the appellant be allowed against that sum 100*l.* with interest from the 19th of *September*, 1789, and that the court below, be di-

rected to execute this decree, and that the decree below, be, in all other respects, reversed.

Judgment accordingly.

ALBANY,
February, 1805.

Taylor
v.
Delancy.

William and George Taylor, *Appellants*,
against
Ann Delancy, *Respondent*.

ON appeal from a decree of the judge of probates, on the following facts.

John Taylor died intestate, leaving a widow, three sons, *William*, *George* and *Charles*, and three daughters, *Ann*, the respondent, *Phæbe* and *Mary*. The widow having renounced the administration, the two daughters, *Phæbe* and *Mary*, united with their husbands in petitioning the surrogate to appoint *Ann* sole administratrix, she being the eldest child. Against this, *William* entered a *caveat*, claiming a right to be joined with her, which she denied. Whilst the *caveat* was pending, the four other children presented to the surrogate an *ex parte* paper, stating as objections to *William*, 1st. That he was so much engaged in commerce, as not to have time to attend to the estate. 2d. That the family could not, at all times, have access to him, which, if he was an administrator, would be inconvenient. 3d. That he was at variance with the other branches of the family, and his temper such as to promote discord rather than harmony. 4th. That they were persuaded, it would be his object and *interest*, to delay a settlement of the estate. 5th. Because the law does not favour joint administrations.

The surrogate has a discretionary power to elect out of those of the next of kin to an intestate, any one in an equal degree, and grant to such person, sole administration.

The surrogate, under these circumstances, decreed administration to be granted, exclusively, to

ALBANY,
February, 1805.

Taylor

v.
Delancy.

Ann. From this, *William* appealed to the judge of probates, and on the proceedings being transmitted, *George* petitioned to be united with any person, to whom the administration might be granted. His honour, having affirmed the decree of the surrogate, directed sole administration to *Ann*, on which, the case was now brought before this court.

Henry, for the appellants. This case brings up two questions. 1st. Whether a surrogate has a discretionary right to elect, among persons in equal degree, to whom he will commit administration?—2d. Whether, admitting this discretion, it has, on the present occasion, been duly exercised? To determine the first point, it will be necessary to investigate the origin of the power, now conferred on the surrogate, in granting administration; to trace from it its common law source, to the statute provisions in *England*, and mark the diversity in them, from the act of our legislature on the subject.

Antecedent to parliamentary provisions, the king, in cases of intestacy, as *parens patriæ*, was entitled to the goods of the deceased, in order to defray the expenses of his funeral, discharge his debts, and apply them to the benefit of his wife and children. If there were none, those goods, as a branch of the royal prerogative, constituted a part of his revenue, which he obtained possession of by his ministers, and most probably, through the medium of the county courts. At length, through the influence of ecclesiastical persons, the administration of intestates' effects was granted to the ordinary, who, after giving one-third to the widow and children, was imagined to dispose of the residue, or dead man's part, in *pious usus*, for the

ALBANY,
February, 1803.Taylor
v.
Delancy.

benefit of his soul. The abuses, however, of the clergy, called for legislative interposition, and it was by the 31 *Ed. 3. c. 11*, enacted, that the ordinary should grant administration to the "next and most lawful friends" of the deceased. This was construed to mean such of the next in blood, as did not labour under legal disabilities. What those were, are specified in *Hensloe's case*, 9 *Rep.* 39, and *Toller's law of Exe.* 66. But the ingenuity of the churchmen attempted to narrow this right, by choosing from among those of the next of kin, him who would purchase the favour, or be most obsequious to them in the distribution. This power of election being a doubtful right, the 21 *Hen. 8, c. 5*, was passed, to confer it. By the words of the statute, the ordinary is empowered to grant administration to the widow or next of kin, or both "*as by the discretion of the same ordinary shall be thought good*. And in case, where divers claim the administration, which be in equal degree of kindred to the person deceased, and where any person only desireth the administration, as next of kin, where, indeed, divers persons be in equality of kindred, as is aforesaid; that in every such case, the ordinary to be *at his election and liberty to accept any one or more* making request, where divers do require the administration." This statute is, by *Blackstone*,* termed an enlarging act. * 2 *Comm.* 496.

It was passed to give privileges to the church, and confirm that power of election, which they before used, though with some degree of distrust, of nominating the most pliable of the kindred, to the administration. It was a boon to the ecclesiastical

ALBANY.
February, 1805.

Taylor
v.

Delancy.

* 22 & 23 Car.
2. c. 10.

† 1 Rev. Laws,
318, sec. 5.

order. It was the abuse of it which induced the statute of distributions* to put an end to those frauds which had been practised under the former laws. After this plain history of the right of election in the ordinary to exclude some and prefer others to the office of administration, can it be argued that it was bestowed to avoid the inconvenience of joint administrations? It is not the result of common law principles, but the effect of positive institution; and if our act does not bestow the same discretion, it cannot exist. The words made use of by our legislature are, that administration of the estate of any person dying intestate, shall be granted "to the widow, or next of kin of the intestate, or some of them, *if they*, or any of them, will accept the same."† These expressions do not vest the surrogate with a discretionary power to elect one of the next of kin solely, and in exclusion of those who "will accept the same." The sentence, if at full length, would read thus, "to the next of kin if they will accept the same, to some of them, if any of them will accept the same." Therefore, if all in the same degree accept the administration, the surrogate must grant it; if, indeed, all do not choose to accept, then he may grant to some. The law is mandatory, and does not allow of any discretion. That this was the intention of those who framed and revised it, is evident, from comparing the phraseology of the old act, with that of the present day. By the former, the ordinary was empowered to grant administration "to the widow or next of kin of the intestate, or to some, *or one of them*, if they or any, *or either* of them will accept the same."‡

‡ Gain's folio
edition.

No such words are to be found in our amended code, and it is not to be presumed they were rejected without reason. The sixth section of the act now in force, corroborates our positions. For it requires all the next of kin to be cited, in case any other person should apply for administration. Why cite them if all were not entitled? No inconvenience can arise from the bonds required, because each administrator is allowed to find his own separate surety.—As to the second point, we surely are justified in saying, though the surrogate may be entitled to the discretion he claims, he has, in the instance now before the court, abused it. Our system allows, it is true, to its judges, the exercise, in some instances, of their discretion; but then it must be such a one as is sound and lawful, not arbitrary and capricious. Therefore, if once duly made use of, it can never be revoked, and administration granted to another; for that would be arbitrary.—11 *Vin. Abr.* 114. *pl.* 10. (*n.*) Men, and even a mercantile character, have been passed by, to grant administration to a woman, whose education and very sex must be against the appointment. This last circumstance has been said, of itself, to be an objection, because, “she may marry, and so put herself and her goods under the power of another.” 12 *Mod.* 619.* Should the court be of opinion with us, they will, therefore, grant the administration, as we suggest, to all who will accept; for, in cases of this sort, when the decision appealed from is set aside, the inferior tribunal is ousted of its jurisdiction, and the court which reverses, shall grant administration *de novo*. *Reeve v. Denny*, 11 *Vin. Abr.* 76. *pl.* 12.

ALBANY,
February, 1805.

Taylor
v.
Delancy.

* *Blackborough*
v. Davis.

ALBANY,
February, 1805.

Taylor
v.
Delancy.

1 Rev. Laws,
658. sec. 28.

Harison and Van Vechten contra. The rights of the appellants rest entirely on our statute provisions, and it is, therefore, unnecessary to travel back into the remote periods of ecclesiastical abuse. Antecedent to the general repeal* of the English acts of parliament those of *Ed. 3. and Hen. 8.* were in use here. When they were abrogated, it was not from any view inimical to their spirit, but to adopt the same principles under an act of our own. The existing act of the legislature is to be expounded according to the reason of the antecedent law, and never to be construed to repeal, further than that reason will justify. The discretion now practised by the surrogate has been sanctioned by a usage of years. Nothing but a clear intent ought, therefore, to abolish it, instead of the constructive alteration which the counsel for the appellant has laboured. By being authorised to grant to *some*, the surrogate is necessarily empowered to refuse to bestow on all. The words of the law clearly mean, that he may grant administration, to any, or any one of those who are next of kin, or to any one of them who will accept the same. When we look at the former law, which it was not intended to depart from, we can easily perceive that the "any" must signify any *one*, at his election. This power of election is indispensably necessary. Persons next of kin may be under disabilities, which would render it almost criminal in the surrogate not to reject. They may be bankrupts, or largely indebted to the intestate. Without a discretion, therefore, he could not do justice to the estate. But that appointing a woman should be an abuse of it is rather singular, when the legislature, in the case of a widow, direct it to be given to her. If we are correct in our idea of a dis-

ALBANY,
February, 1805.Taylor
v.
Delancy.

cretion in the surrogate, the appeal cannot be maintained. From the use of discretionary powers there is none. It is contrary to their nature. On applications for new trials, setting aside defaults, rehearings in chancery, allowing or directing informations in the nature of a *quo warranto*, no exception can be taken, or writ of error brought. They may, indeed, be subjects of criminal proceeding, by indictment or impeachment, but never can be the groundwork of appeal or error. The *argumentum ab inconvenienti* is conclusive against the right. An instance has very lately occurred in the city of *New York* of a death where the next of kin consisted of 150 persons, all in the same degree. This alone is sufficient to affirm the decree below.

Pendleton, in reply. We must construe the clause in our statute distributively. To the next of kin, if they will accept, or some of them if they will, or any them if they will accept the same. It is a positive law, and however inconvenient, it is not with this, or any other court, to repeal it.

Per curiam, delivered by SPENCER, J. The appellants' counsel have insisted, 1st. That under the 5th section of the act, "relative to the court of probates, the office of surrogate, and the granting of administrations," there is no discretion vested in the surrogate, to select one of the next of kin in equal degree, where they all request administration, and are under no legal disability. 2d. That in this case, if such discretionary power is given by the act, it has been so exercised as to require correction by this court.

The only legislative provisions on the subject, are to be found in the acts of the 14th of *February*, 1787,

ALBANY,
February, 1805.

Taylor
v.
Delancy.

and the 27th of *March*, 1801. The former of these statutes directs, "that where any person dieth intestate, the widow, or next of kin, *or any of them*, of the deceased person if they, or either of them, will accept the same, &c. shall be deputed." The latter statute ordains, "that administration of the goods, and chattels, and credits of any persons dying intestate, shall be granted to the widow, or next of kin of the intestate, or some of them, if they, or any of them, will accept the same." These acts are of the description of revised laws, and if susceptible of doubt in their interpretation, resort must be had to the law existing antecedently. By the constitution, the British statute of the 21st *Hen.* 8. regulating the granting of administrations was adopted and recognised as the law of the state. The 35th article of the constitution, ordains, that such parts of the common law of *England*, and of the statute law of *England* and *Great Britain*, and of the acts of the legislature of the colony, as together did form the law of the said colony, on the 19th of *April*, 1775, should be and continue the law of this state, subject to such alterations and provisions as the legislature should from time to time make concerning the same. The statute of the 21st *Hen.* 8. became thereby the law of the state, and the 5th chap. 3d and 4th section of that statute in express terms, gave to the ordinary a right to accept one or more administrators when there was an equality of kindred, according to his discretion. The revisors of the laws in 1787, well knew that this statute vested a discretion, and still we find no terms made use of negating that discretion, or purporting to change the law. So far from this, it appears to me

that the words "or any of them," in the act of 1787, if they were now to receive a construction for the first time, confer a discretion on the surrogate. My opinion is founded on this proposition, that where the law, antecedently to the revision was settled, either by clear expressions in the statutes, or adjudications on them, the mere change of phraseology shall not be deemed or construed a change of the law, unless such phraseology evidently purports an intention in the legislature to work a change. A contrary construction might be productive of the most dangerous consequences. The quaintness of expression in some of the ancient British statutes, the circumstance of there being several statutes on the same subject, required in many cases, an entire change of language, but it has never, until now, been contended, that thereby an alteration of the law was to be inferred.

If this was a case wholly depending on the statutory provision, of the act of the 27th of *March*, 1801, (and to this as a revised law, the same observations are applicable, as have been made in relation to the statute of the 14th of *February*, 1787,) I should incline to the opinion, that the words, "or any of them," would vest a discretionary power in the surrogate, of making an election between those in equal degree. If, however, the words are doubtful, arguments from inconvenience would have a decisive and conclusive influence. Nothing could be more absurd than to require the surrogates to confer the right of administering on all who are next of kin, and who may desire it, when their numbers, their residence, their personal qualifications would, in prudence, require their exclusion. I am, therefore, clearly of opinion,

ALBANY,
February, 1805.

Taylor
v.
Delancy.

ALBANY.
February, 1805.

Taylor
v.
Delancy.

that the surrogate had a discretionary power of selecting one to the exclusion of others, by which I mean a sound legal discretion not founded in whim or caprice.

As to the second point, whether the abuse of discretion is a ground of relief here. I am not disposed to say, that there may not be cases where the exercise of a discretion in an unjust and illegal manner, would not be re-examinable and relievable. Of this there may be a doubt, and in the case of *Preston and others v. Ferrard*, 2 Bro. Pa. Ca. 179, the house of lords affirmed the chancellor's order, on the ground that the act of 2d of *Anne*, had conferred on him a discretionary power to appoint guardians to the children of Romam Catholics. Without expressing a decided opinion on this point, it appears to me that the present case furnishes no facts from which the court can perceive an abuse of discretion. It is to be intended, that all decrees, solemnly pronounced, are just, until the contrary appears. The surrogate may have had good reasons to guide his discretion, of which we are not connusant. Neither of the parties, from any proofs in this cause, appear liable to any objection, except that the respondent is a female; and this has been urged as one. It is a sufficient answer, to say, that the statute makes no discrimination as to the sexes; and certainly, the court cannot consider that an objection, which the legislature have not. In my opinion, the decree appealed from ought to be affirmed.

Decree of affirmance.

Paschal N. Smith, President of the Columbian Insurance Company, *against* William Bell, Joseph Bell, and Samuel Watson.

ALBANY,
February, 1805.

Smith
v.
Bell & others.

IN error, upon a bill of exceptions, tendered and sealed on the trial of this cause, at the circuit court, in the city of *New-York*, in which the now defendants were plaintiffs.

The action was on a policy of insurance on the ship *Mary-Ann*, valued* at 14,000 dollars, "at and from *Charleston* to *Glasgow*, and at and from thence to *Philadelphia*, or one other port in the *United States*." The plaintiffs went for a technical total loss, in consequence of the vessel's having been stranded on the coast of *Scotland*, and injured to an extent, which required 7,221 dollars to repair. They gave in evidence a subsequent sale of the vessel at *Greenock*, on account of those who might be concerned, the purchase by the firm of *Archibald Campbell & Co.* and her reparation at an expense exceeding half her value. The defendants relied on their having paid into court the sum of 5,100 dollars, contending, that as the amount of expenditure for repairs, was only 7,221 dollars, and they were entitled to a deduction of one-third, new for old, they were chargeable with only 4,884 dollars 32 cents, which, not amounting to half the value of the vessel, could not constitute a technical total loss. That, therefore, as they had paid into court, 5,100 dollars, the verdict ought to be in their favour, it being the law, that the allow-

To constitute a technical total loss of a ship, by damage, from the perils insured against, she must be injured to the amount of half her value, or more, after deducting the one-third, new for old, allowed the underwriter; that is, she must be injured to the extent of three-fourths of her value, or more.

* There is some uncertainty as to this in the printed case. The first page states it to be an open policy; the second, that "in and by" the policy, she was "valued at," &c.

ALBANY,
February, 1803.

Smith
v.
Bell & others.

ance of one-third, new for old, should be made, before the right of recovering as for a total technical loss, on account of damage sustained under the policy, could arise.

The judge, however, at *nisi prius*, thinking otherwise, the verdict was, under his direction, given for the plaintiffs, and the case now came up on this single question ; whether the underwriter on a ship is liable for a total loss, when the injury she receives from the perils insured against, deteriorate her more than half, without deducting the one-third, new for old ; or, whether the one-third, new for old, must not first be allowed the insurer, and the injury, after that deduction, amount to the half her worth, or more ?*

*I was not present at the argument.

The determination at *nisi prius*, was founded on a decision of the supreme court, in the case of *Dupuy v. United Insurance Company*, in which, from the notes of KENT, Ch. J. it appears the court ruled to this effect.

Where the repairs are equal to half the value, and more, the insured have a right to abandon. The rule is general, and has no reference to the distinction of new for old. It is the actual expenditure, or damage which is taken into view, and on the abandonment, the insurer has all the benefit of the repairs. The rule of deducting one-third, new for old, can be applied only in a case of partial loss. Here there was a clear case for abandonment, and the plaintiff must have judgment.

Per curiam, delivered by *Lansing*, chancellor.—On this case, only two questions are presented for the consideration of the court. 1st. Whether, on a policy of insurance, on the estimate of repairs of a

vessel, injured by any of the perils insured against, new materials substituted for the old, do not entitle the insurer to an allowance? and if-so, 2d. At what period is the allowance to be admitted?

ALBANY,
February, 1805.

Smith
v.
Bell & others.

These questions are open here. They must, in a great measure, depend upon general reasoning, drawn from the nature of the contract of insurance, and that reasoning may be comprised in very narrow limits.

The vessels employed in commercial enterprises, are of various degrees of strength and durability, and more or less adapted to resist the perils of the seas; but the lowest grade in which they are recognised, as subjects of insurance, is when they are barely seaworthy.

The hull, masts, sails and rigging of a vessel may be in a situation to constitute her seaworthy, and yet be much inferior to what they were when they came from the hands of the workmen who constructed them; and a regular gradation may easily be conceived between a vessel perfectly new, well-built, rigged and furnished, and one that is barely seaworthy. When an injury is sustained by a vessel of the latter description, and it becomes necessary to supply her old masts, timbers, sails and rigging with new, it is evident that in all these particulars, she must, in most instances, be placed in a better state by the repairs, than she was before the injury received, the ordinary wear and tear not being within the purview of the policy. Hence, the repairs are carried to a point beyond the mere reinstatement of the vessel, and beyond the indemnity intended.

ALBANY,
February, 1805.

Smith

Bell & others.

* 2 D. & E. 407.

413.

411.

In the case of *Da Costa v. Newnham*,* determined in the British court of *King's Bench*, since the revolution, the usage which obtained with respect to the repairs of allowing one-third, new for old, seems to have been acknowledged, and it is now urged in argument, that at any rate, whether or not the defendant was entitled to this allowance, was a question for the jury, *as it depended upon usage*.—*Buller*, justice, speaks of it as a usual allowance, and *Ashhurst*, J. observes, that the allowance of one-third of the repairs, *is the rule*, where the ship is repaired and delivered over again to the owner, for his benefit. That case arose, on a technical total loss, which the insured did not avail himself of, by abandoning. The recovery was for an average loss of upwards of eighty *per cent*. The ship had been repaired at the instance of the insurers. They refusing to pay for the repairs, a bottomry bond was executed on the vessel, in consequence of which, she was sold to satisfy the debt.

It was contended that the value of one-third of the repairs ought to be deducted, and the answer to this, which appears to me conclusive, was, that the repairs, having added to the value of the vessel, must have been compensated for, in the sale, on the bottomry bond, and the owners never had the ship, so they could not be the better for the repairs.

From the expressions made use of by the judges, who decided this case, it does not appear that they relied upon the usage of any *particular* trade; but upon the usage of trade generally; and as there is no power on earth, to enact positive regulations for the

wide extended regions of marine enterprises, general usage, established from the principles of general convenience, and sanctioned by the experience and practice of merchants, is the only source of general maritime law.

ALBANY,
February, 1805.

Smith
v.
Bell & others.

The rule that constitutes the loss of more than one-half the value of the subject insured, a total loss, is a positive one, originating in the convenience of having a determinate and precise test in all cases, which, by its universality and uniformity, may render inquiries into minute objects, rather calculated to perplex than to elucidate, unnecessary.

The precise difference between the value of the old and new materials, must generally be difficult to ascertain. That difficulty is much increased, by the estimate necessarily required of the value of the old, at the home port, and of the new, at the port of repair. It is, therefore, desirable, to have some invariable standard, not calculated, for that is impracticable, to meet precisely all the variety of cases, which may occur, so as to render exact justice in each ; but such a rule as will nearest approximate to producing that effect, if generally applied. That effect, if a rule respecting the subject is to obtain, it was not contended, might not be produced in the proportion alluded to in the case of *Da Costa v. Newnham*. From the nature of the contract of insurance, I think the allowance for replacing the old materials, with the new, is reasonable and proper ; and, if so, that, as the deduction is professedly made, on the principle that the value of the subject insured, has been enhanced to that amount, that deduction ought to be made, before the test of technical total loss or

ALBANY,
February, 1805.

Smith
v.
Steinbach.

not is applied ; for the doctrine of technical total loss is expressly founded on the position that the subject insured, has been deteriorated more than one-half.

I am, therefore, of opinion, that the judgment of the supreme court be reversed.

Judgment of reversal.

Paschal N. Smith
against
Joaquim L. Steinbach.

A policy on freight at and "from" a foreign port, attaches on the commencement of lading the goods on board. A vessel seized on suspicion of a breach of neutrality is not, from such a circumstance, to be held guilty of a breach of neutral conduct. An abandonment is never too late if the loss continues total at the time of the action brought. A demurrer to evidence confesses every fact which the jury could have found from the evidence. A seizure by a foreign state, of a vessel in a port of that state under a suspicion of a breach of neutrality, is a loss within the clause in a policy of insurance against the restraint of princes, &c.

IN error upon a judgment pronounced by the supreme court* in favour of the defendant, on a demurrer to evidence.

The count averred a loss under the policy from arrest and detention by the *Spanish* government. The testimony to support this, and demurred to on the trial, showed an insurance on the freight of the ship *Cutharine*, then at *Barcelona*, effected on the 23d of *October*, 1800 ; a seizure of the vessel by the *Spanish* government, in the *September* preceding, on suspicion, that " the captain had aided a *British* frigate in cutting out, and capturing two *Dutch* vessels." An abandonment on the 30th day of *December*, 1801, between which time and *September*, 1800, a witness, examined in the cause, proved that opportunities from *Barcelona*, to *New-York*, were frequent, and had occurred. Lastly, a subsisting detention in *July*, 1802.

KENT C. J. read the opinion of the supreme court as delivered by *Livingston*, J. from 2 *N. Y. T. R.*

* See 2 *N. Y. T. R.* 129 to 134.

ALBANY,
February, 1805.Smith
v.
Steinbach.

130. Mr. *President*. Several objections were made to the plaintiff's right of recovering. 1st. It was alleged that the voyage contemplated, while the *Catharine* was at *Barcelona*, was different from the one insured, and that therefore the risk never commenced. The insurance being *at* and from *Barcelona*, it may admit of doubt, whether, as the loss happened there, the defendants would not be liable, although a voyage to the *Havanna* were in contemplation. But on this point of law, we gave no opinion, because it was sufficiently proved that the vessel was destined for *Baltimore*. Thus have the jury found, in another action on a policy on the ship, nor could their verdict have been different, without disregarding all the testimony in the cause. The defendants themselves were aware that this finding comported with the evidence, and, accordingly, directed their principal attack against the testimony itself; for they said—2d. That *Mumford* was the plaintiff's witness, and therefore could not be discredited by him.—Whether this gentleman be regarded as the witness of the one or of the other party, is not very material in deciding this cause: he had been examined out of court, at the instance of the defendants, and cross-examined by the plaintiff, who produced his deposition on the trial. Perhaps the best general rule in such cases, would be to consider the witness, if his deposition be read, as belonging to the party on whose application he was examined, without any regard to the person who may finally make use of it. But without deciding this point, we thought nothing was done by the plaintiff to discredit *Mumford*, even if he had been his witness. It is not every mistake which a witness may make, when speaking from memory, that will discredit him,

ALBANY,
February, 1805.

Smith
v.
Steinbach.

and it would be a strange rule, indeed, that a party producing a witness, should not be permitted, even by the witness himself, to correct a mistake which he may have committed. Nothing more was done. *Mumford* had sworn, that from certain papers, the destination of the cargo, according to his recollection, appeared to be for the Havanna : after this, there could be no impropriety in showing him the papers to which he alluded, or any other to refresh his memory, and to enable him to correct his error, if he had made one. This was no imputation on his character ; it neither rendered him infamous nor unworthy of credit, as to the other point to which he had deposed :—It discovered in the witness a laudable promptitude to rectify a mistake, into which an imperfect recollection had betrayed him, and thus added to, rather than detracted from, the weight of his testimony. 3d. The exhibits B. and C. being only copies, should not, it was said, have been produced. If no allusion had been made to these papers, by *Mumford*, they could not have been produced, to show the real object of this voyage, but he had already testified that he had made out certain claims against the *Spanish* government, for the *Catharine* and her cargo, which stated the vessel to be bound directly for the *West-Indies* ; these papers, he added, were lodged in the Consulate office, at *Barcelona*. —Having sworn thus far from memory, the plaintiff had a right to refresh his recollection, by the showing him copies of the claims referred to ; on inspection, he might probably be able to determine whether they were true copies or not, and certainly if he believed them true, they would furnish better evidence

of what the originals contained, than any parol account of their contents, which was the only way in which the defendants had attempted to prove them. There is no reason to say, the originals were in the plaintiff's possession. They remained in a public office in *Spain*: and this kind of inferior proof, was rendered proper by the defendants' own conduct. They had not only examined the witness, as to the contents of these papers, but gave the plaintiff every reason to believe, that nothing would be required of him, but proof that the property was American. 4th. The abandonment, it was said, was too late. The *Catharine* was seized in *September*, 1800, and not abandoned until fifteen months thereafter. It has already been decided by the supreme court, in *Earlv. Shaw*, that an abandonment may be made at any time after the accident, provided, at the date of the abandonment, the loss still continue total. This being the case here, the abandonment was in season. 5th. It is contended that Mr. *Mumford* was mistaken or surprised on his cross-examination, and that, therefore, a new trial should be had. For this purpose, his affidavit was produced, taken nine months after the trial, in which he stated, that the captions of the exhibits B. and C. were not shown to him, to the best of his knowledge and belief, and endeavoured to explain why they were made as they appeared; to wit, to prevent endangering the insurance. This explanation came too late; a witness under examination may explain and correct himself, but it would be dangerous and improper to receive any elucidation from him; after the trial, and especially after the lapse of so many months: besides, the defendants were apprised of his deposition, long

ALBANY,
February, 1805.

Smith.
v.
Steinbach.

ALBANY,
February, 1803.

Smith.
v.
Steinbach.

* It is no ground for the court to grant a new trial, that a witness called to prove a certain fact, was rejected on a supposed ground of incompetency, where another witness who was called, established the same fact, and the defence proceeded upon a collateral point on which the verdict turned. *Edwards v. Evans*, 3 East, 451.

before the trial, and were without excuse, for not calling on him then, to make such explanations as might have been deemed important. 6th. But it was said there had been a discovery of new evidence, and for that reason there should be another trial. It was also said, that if a new trial had been granted, there were two witnesses who were not known to the defendants at the time of the trial, who could testify as to the destination of the *Catharine*.—This was the fact principally controverted on the former trial, and we were applied to for another, merely because all the witnesses who knew something of the matter, had not been examined.* Every one must perceive the inconvenience and delay which would arise from granting new trials, upon the discovery of new testimony, or other witnesses to the *same* fact. It often happens that neither party knows all the persons who may be acquainted with some of the circumstances relating to the point in controversy: if a suggestion, then, of the present kind be listened to, a second, if not a third and a fourth trial, may always be had: there may be many persons yet unknown to the defendants who may be material witnesses in this cause, and this may continue to be the case after a dozen trials. Cases may occur in which, if great doubts exist, as to the first decision, it may be proper, on the discovery of further witnesses, even to the same fact, to open the cause for a second discussion; but this is not one of them. The principal fact here was clearly proved, and if Lewis and Byrnes had both been examined, it is very uncertain whether the result would not have been the same.

Pendleton, for the plaintiff. The effect of a demurrer to evidence is, that the demurrant, admitting all the facts which appear in evidence on the trial, still says they are not sufficient to entitle the party who produces them, to recover or maintain the issue. The proceeding is founded on this principle, that where facts are agreed on, there is no occasion for the determination of a jury ; for, all that is then necessary, is to pronounce the law on them. But when the facts are not agreed to, then they go to a jury to determine their existence. In this case the facts stated, are acknowledged. The court is now to decide whether every fact necessary to entitle to a recovery for the loss claimed, has been proved. If not, we think ourselves justified in saying there must be a reversal ; because it is, in all actions, the duty of a plaintiff to make good his claim, it being never required of a defendant, to show negatively, that there is no title to a recovery. An insured, then, ought to establish, that the subject matter was at the risk of the underwriter ; that it was in such a situation, as to be within the terms of the policy, and the nature of the loss such as will authorise a resort to the assurer. On the present occasion, it should have been made to appear, not only that the *Catharine* was at *Barcelona*, but bound to *Baltimore*, on the voyage insured, and that under these circumstances, she was seized. To this, the proof is inadequate. For though the being at *Barcelona*, and the seizure are established, there is a defect in the testimony, as to the port of destination ; unless, indeed, the court may infer that the *Catharine* was to go on the voyage described,

ALBANY,
February, 1805.

Smith
v.
Steinbach.

ALBANY,
February, 1805.

Smith
v.
Steinbach.

merely from her being at the port from whence insured. This can never be a matter of inference, for it is laid down, that "the loss must *appear* to have happened during the continuance of the risk." *Marsh.* 615. In *Woodbridge v. Boydell*, *Doug.* 16, the words were "*at* and from *Maryland* to *Cadiz*," but because it was not shown that the vessel was bound on the voyage insured, it was held that the policy did not attach, and the plaintiff not entitled to recover. The same principle is found in *Murdock v. Potts*, *Marsh.* 230. The mere being *at* a port does not comprehend sufficient proof, that the vessel was there for the purpose of pursuing the voyage described. Though a demurrer to evidence admits the facts proved, it does not warrant the presumption of a fact not in evidence. If such may be inferred, the party demurred to, should specify them, and is not bound to join in demurrer till they be admitted, or proved. If, however, such fact be material for the determination of the cause, as it neither admitted nor proved, but only inferred, there should be a *venire de novo* directed. This, however, is not that, on which we principally rely. We contend, that as the plaintiff founds his claim on a seizure upon suspicion of an act of his agent, which, if true, would amount to a violation of neutrality, and vacate the policy, he was bound also to establish, that there was no ground for the suspicion. Not having done so, and joining in demurrer, he has admitted the cause of suspicion to be well founded, and cannot, therefore, recover. We insist also, that the rule adopted in the supreme court of allowing the underwriter at any period to bring his action, and recover

ALBANY,
February, 1803.Smith
v.
Steinbach.

as for a total loss, if the loss then continue total, is erroneous. The principle of insurance law is, that the assured, when informed of an event by which he is entitled to abandon, ought to elect to do so, within a reasonable time. If within such time this be not done, it is to be presumed that he has elected not to abandon, and the underwriter will be liable only to an average loss. In *Marshall*, 508, the rule on this subject is accurately stated. He says, "that as soon as the insured receives advice of a total loss, he must make his election, whether he will abandon or not. If he determine to abandon, he must give the underwriters notice of this, within *a reasonable time*, after the intelligence arrives; and any unnecessary delay in giving this notice, will amount to a waiver of his right to abandon; for unless the owner does some act, signifying his intention to abandon, it will be only a partial loss, whatever may be the nature of the case, or the extent of the damage." This doctrine is justified by reason, as well as authority.—Abandonment is the act by which the assured transfers to the underwriter, the chance of recovering what is saved, and calls upon him, as if the subject insured had been totally lost. For where there has been an actual total loss, there can be no abandonment. For it is founded on a supposition, that something has been saved, or maybe so. It is, however, an extreme remedy, and allowable only in extreme cases. If the property be in such a situation, that it may be recovered, the equity of the law says, we will not oblige the assured to wait the event, but we will permit him to call on his underwriter, who shall take the chance of recovery. Hence, it is optional, whe-

ALBANY,
February, 1805.

Smith
v.
Steinbach.

* In *Hamilton*
v. *Mendez*.

ther an insured will abandon or not. "The insured is not obliged to abandon in any case. He has an election." *Per Lord Mansfield, Marsh. 494.** But his election is a positive act, of which notice must be given, in order to place the underwriter in a situation to look after the property. What act is to be done, to evince the intention of not abandoning.—None that is overt. It can be manifested only by being passive. Therefore, abstaining from abandoning, must be an election not to abandon. Proceeding in attempts to recover the property, is evidence that an abandonment of it was never contemplated, and an indemnity for the expenses incurred, all that was looked forward to. Fourteen months passed without any notice taken of the accident.—After such a lapse of time, it is to be presumed, that the party has elected to run, himself, the chance of recovery. If not, and no limitation be put to the period, within which an insured must elect, it can never be known to an underwriter, when his responsibility ceases; it may last forever. The convenience of the thing, therefore, requires, that abandonments should be allowed only within a reasonable time, and *that* should be limited by the period, within which, communication is in general received, unless it be shown, that none has arrived. The contrary doctrine opens a door to fraud, and affords an opportunity to speculate on the underwriter. Under a particular clause in our policies, the underwriter is to pay all charges incurred in defending the subject of his policy. Is the assured to go on for any length of time, involving his insurer to any amount of expenses, and if the property be recovered, take it to

ALBANY,
February, 1808.Smith
v.
Steinbach.

himself, if not, claim for a total loss, and demand payment of the expenses also? Surely, where the whole of the subscription is to be required, the insurer ought to have a discretion allowed him, to pay the amount, and relinquish the pursuit. By such a system, the assured cannot suffer, though, by rejecting it, the assurer may. The underwriter has a right to insist on being put in a situation to act for himself, and not to have forced upon him an agent, whose interest it is to hazard every kind of expenditure, because, whatever may be the result, he cannot lose, and may gain. It is inequitable, that the underwritten should, at his pleasure, wait the termination of the accident, before he abandons, and yet the underwriter not be able to act for himself, but at the permission of the insured. He ought to be obliged to elect to abandon or not, before the consequences of the event are known, and not to be at liberty, without notice, to saddle the insurer with expenses and charges. No country leaves the period of abandonment totally in the breast of the underwritten. By many nations, the time within which to be made, is expressly limited. But to leave it without bounds, is held to be law in this state alone. The *English* decisions are in conformity to the principles I have advanced. In *Mitchell v. Edie, Marsh.* 510, Mr. justice *Ashurst* says, "the insured are bound to decide and signify their election to the underwriters the first opportunity; for though the person who takes upon him to act on the occasion, for the benefit of all concerned, is not the agent of the insured; yet, if, upon receiving notice of the loss, they do not elect to abandon, they adopt the acts of such person, and make him their agent." In ano-

ALBANY,
February, 1805.

Smith
v.
Steinbach.

* *Allwood v.
Henkell, Park,*
172.

ther case,* the having sent a letter of attorney to receive and remit the proceeds of a cargo sold, and lying in a court of admiralty, was held such an intermeddling, as to destroy the right to abandon, for, said lord *Kenyon* "the insured must make his election speedily, and put the underwriter in a situation to do what is necessary for the preservation of the property, whether sold or unsold." By the 42d art. of the marine, it is required to give instant notification of the loss, with a declaration of having elected to abandon, when the period allowed so to do, has expired. 2 *Emer.* 180. From this, it appears, that the principle we contend for, is acknowledged even by the law of *France*, which does not exact an immediate abandonment.

Hoffman and *Harison*, contra. A demurrer to evidence not only admits every fact which has been offered in testimony, but every deduction which, from those facts, a jury *might* make. This is consonant to the reason of the thing. For, as by such a proceeding, the case is taken from the jury to the bench, the court is substituted in their place, and may make every inference they might draw. By adopting this mode of procedure, a party cannot deprive his adversary of any advantages a jury trial would afford.—He concedes, that they shall all be his, if the evidence be determined sufficient to maintain the issue. After the applicability and legal qualities of the testimony are allowed, the court pronounces the judgment in conformity to what they think a jury would have been warranted in determining. These principles have been settled in the *English* courts, by the case of *Cocksedge v. Fanshaw*, *Doug.* 119, and in ours, by that of *Livingston v. Shutz*. We con-

ALBANY,
February, 1805.Smith
v.
Steinbach.

tend that the circumstances of a vessel being at a port, taking in her cargo there, and a policy effected on the freight to arise on that cargo, from the port where she was, to another, are sufficient to warrant an inference, that she was destined for the port to which insured. But we are told, that having shown a seizure on suspicion, we ought to have proved that suspicion to have been groundless, or it must be presumed it was well-founded. This is contrary to every principle of law, and repugnant to the nature of the proceedings now before the court. 1st. As a matter of defence, it ought to be made appear, by the now plaintiff. 2d. As the demurrer admits the fact of the seizure, it is to request a presumption against the plaintiff's own admission. He who demurs to evidence, asks nothing for himself, but denies that his opponent has shown any right. For a person tendering a demurrer, no presumption, therefore, can be made, as he concedes all presumptions are to be on the side of his adversary. That the right of abandonment is taken away, unless exercised immediately after notice of the loss, is not, as a universal rule, warranted by the cases cited. They establish no more, than that when the restoration of the property, or any other circumstance, shows the loss is no longer total, the assured cannot, by an abandonment *then* made, convert that which is at the time, a partial into a total loss, merely because it had once technically subsisted. Thus, in *Mitchell v. Edie*, the vessel, after being captured and plundered, was restored, but, from the taking away of her rigging, obliged to make for a port of necessity, where the proceeds of the cargo were in the hands of a part owner for near three years, and the underwri-

ALBANY,
February, 1805.

Smith
v.
Steinbach.

* 1 vol. 21.

ters called on, merely because he had failed. The court held this a partial loss, not to be turned into a total one, by abandonment. So in *Albwood v. Henckell*, the vessel was captured, recaptured, restored on salvage, and the money in the admiralty.—The total loss had ceased, and, therefore, there could be no abandonment. On this principle, the determination of *Church v. Bedient* and *Kimberly** proceeded. If, indeed, the underwriter has paid the loss, he then becomes a purchaser of the subject insured, and though it be afterwards recovered, it will belong to him. *Da Costa v. Firth*, 4 Burr. 1966. The consequence will be the same, though it be, in fact, restored at the time the amount of the subscription is paid. It is a fallacy, to say, that the underwriter is injured by allowing of an abandonment, at any time, whilst the loss continues total. The assured is, by the policy, warranted in prosecuting for the recovery of the property. If he succeeds, it will go in diminution of the loss. If he do not, he has acted only according to his authority, and as the loss is then total, the underwriter is, of course, liable for the full amount. To adopt the rule contended for by the now plaintiff, would render almost every technical, a total loss. It would deprive the insurer of the agency of the insured, and oblige him always to send a special deputy to take care of his concerns. The property being originally that of the assured, he has a right to calculate when the abandonment is to be made.

Pendleton, in reply, referred to *Gibson and Johnson v. Hunter*, 2 H. Black. 187, in support of his positions respecting a demurrer to evidence, and in-

sisted, that the *spes recuperandi* was a part of the insurer's right, and ought to be abandoned to him.

ALBANY,
February, 1805.

Smith
v.
Steinbach.

Per curiam, delivered by *Lansing*, chancellor.—
On this case, three points have been made. 1st. Whether there is proof that the freight is within the policy? 2d. Whether the insurer is bound to respond for the loss occasioned by a seizure, on suspicion of a breach of neutrality? 3d. Whether the abandonment was not too late to found any right or recovery on?

The plaintiff, by the demurrer to evidence, has admitted every fact which the jury could have found from the evidence.*

From the demurrer, it appears, that the defendant to maintain his issue, had proved that *De Govert*, on whose account the insurance was made, was owner of the vessel, the freight of which was insured by the policy; that he was an American citizen, and that the ship was purchased in the *United States*, of an American citizen. It is further stated, that in the policy she was described as the American ship *Catharine*, and that the defendant had produced the necessary preliminary proofs before the policy was read. These preliminary proofs, among others, from the obvious import of the terms, must have been the evidence that the policy attached to the ship *Catharine*, and, of course, she was an American bottom. This has not been a point in controversy, but it is necessary to advert to it, in making certain deductions, which, I think, must determine the first point.

* *Cockedge v. Fanshaw*,
Doug. 127.
Livingston v. Shutz, in this court.

The policy, *on freight*, was on a voyage "at and from *Barcelona* to *Baltimore*." The ship was seized in the harbour of *Barcelona*.

ALBANY,
February, 1805.

Smith

v.

Steinbach.

It is laid down as a rule, that if an insurance be "at and from" a place, the risk commences from the time of subscribing the policy, if the ship is at home. If abroad, from the first moment of her arrival at the place specified.

2 Marsh. 615.
Tonge v. Watts,
2 Str. 1251.

An insurance on freight, commences at the time the goods are first on board. It has been held that an intention to deviate, will not avoid the policy, and that a risk, once commenced, cannot be apportioned.

If these principles are correct, the policy attached on the freight the instant the goods were embarked at *Barcelona*, which, as related to the ship, was a foreign port. Whatever change in the destination of the vessel might have been contemplated, the risk having commenced, the insurer was entitled to the premium, and if the insured had, by changing the destination of the voyage, diminished the risk, by a deviation not warranted by the policy, he would have lost his money, without any correspondent benefit.

Until the destination of the vessel was actually altered, she was covered by the policy, and as she was at the port of departure, unless the contrary appears, it is to be presumed she was there for the purpose of pursuing her voyage to *Baltimore*.

As to the second point, I know of no instance in which bare suspicion has been considered as *proof* of *breach of neutrality*. It is the every day's practice of belligerents to capture and send into port, neutral vessels navigating the ocean, on the slightest suspicion, which, the rapacity of the captors converts into confirmation so vehement, as to amount to positive proof; but an allegation of the conviction by

the captors, of the truth of such suspicion, can form no ground for judicial decision, or to infer a breach of neutral duties. There is no other difference between this case and that of stopping a vessel on the seas, on suspicion, but that here, the seizure was in port, by an agent, more intimately connected with the government, than those agents who search and send in vessels. But the suspicions of neither can be a guide to the tribunals of our country (who only receive foreign judicial acts as *prima facie* evidence) unless they have been proved to be well founded.

Within the intent, of the policy, this is a mere act of power—a restraint by a foreign prince.

The doctrine of abandonment is only adapted to the case of a *partial* loss, connected with a *total* one, by the operation of law. It is expressly founded on the consideration that the subject insured, though not totally annihilated, for then, nothing would be left for abandonment, is so much deteriorated by the perils insured against, as not to make it worth holding to the insured. It is a doctrine calculated to distinguish between average and technical total loss, as far as respects the insurer, not to create new duties, or impose new burthens on him, but to protect him from practices to which he might be exposed, by speculations on the state of the markets, or other contingencies, which may influence the value of the property insured.

The English doctrine on this subject laid down by lord *Mansfield*, in the case of *Mitchell v. Edie*,* and afterwards adopted and confirmed by lord *Kenyon*, in the case of *Allwood v. Henkell*,† and which appears to me well founded, is, that the insured must,

ALBANY,
February, 1805.

Smith
v.
Steinbach.

* 1 D. & E. 608.

† *Park*, 172.

ALBANY,
February, 1805.

Smith
v.
Steinbach.

* 2 Burr. 1198.

in the first instance, make their election whether they will abandon or not.

In the case of *Hamilton and Mendez*,* lord Mansfield observes, "the plaintiff's demand is for an indemnity; the action, then, must be founded on the nature of his damnification, *as it really is at the time of the action brought*. It is repugnant upon a contract of indemnity to recover as for a total loss, when the final event has decided, that the damnification, in truth, is an average, perhaps no loss at all." So this would be equally repugnant to the nature of the contract, to apply the doctrine of average loss, to a case in which the final event, as far as it has any bearing on the point in controversy between the parties, has determined it a real total loss. For the ship is still detained, and, if she was liberated, the freight which was the object of insurance, is as completely lost, as if she had been sunk in the ocean.

Whence, then, is the estimate of average loss to be taken? and what would the abandonment transfer, from the insured to the insurer?†

† 2 Dal. 280.
Cumberland v.
McCall.

It is certainly not the interest of the insured to delay an abandonment. By doing so, he incurs many disadvantages. His rights on the policy are suspended, and any event which may restore the property insured, however much injured, places him in a situation to recover only an average loss.

Upon the whole, I am of opinion that the insured, when the loss on the policy happened, had it in his election to abandon. That by his delay, he has waived his right of abandoning, so far as might operate to convert an average, into a total loss, and has left the insurer the chance of enjoying the advantage

arising from restoration, intermediate the time in which he waived it, and bringing his action, so as to preclude him from recovering for a technical total loss. But as the loss has continued *really total*, that the defendant had a right to recover, as for such total loss. I am, therefore, clearly of opinion, that the judgment of the supreme court is correct, and that it ought to be affirmed.

Judgment of affirmance.

Le Roy and others, *Appellants*,
against
 Servis and others, *Respondents*.

ALBANY,
 February, 1809.

Le Roy
 v.
 Servis.

THE facts of this case are stated in vol. 1. p. 1, of the introductory cases, but as the opinion there is that of Mr. *Gold* only, the decision of the court is now given.

BENSON, J. I premise, that in a case otherwise properly cognisable in a court of law, if the plaintiff, for want of a *writing*, the evidence of his right, is obliged to sue in *equity*, it is a rule there, that he must verify on *oath*, the allegation that the writing is lost, or in the possession of the defendant; that this rule is in the same reason with the rule in the courts of *law*, in cases of pleas to the jurisdiction, foreign pleas, and claims of cognisance, and is intended only to prevent a change or transfer of jurisdiction, without any cause shown as arising from facts proved on *oath*, and doth not diminish or deprive the defendant of any *real* advantage of *defence*; so, that the proof, although not absolutely

ALBANY,
February, 1803.

Le Roy
v.
Servis.

positive and conclusive, but less precise and full, will suffice. That in order to confine the rule to its mere object, if the bill is for *discovery* only, or if it is for a *general* discovery of *all* writings in the possession of the defendant, whatsoever they may be, and where it is to be supposed the plaintiff hath no *particular* knowledge of them, but yet that some writings of some kind, in which he is interested, and relative to the property he seeks to recover, do exist and are in the possession of the defendant, that in these cases, the allegation of the loss of the papers, or that they are in the possession of the defendant, need *not* be on oath. That until some decisions in *England*, within ten years past, it hath always been held, as it is expressed in the books, that "a *demurrer* being bad in *part*, must be overruled," for it is not like a plea "which may be allowed in *part* ; but a demurrer void in *part* is void in *toto*, and cannot be separated," "that a general demurrer to the *whole* bill, if there is any *part* of the bill to which the defendant ought to put in an answer, the demurrer being *entire*, must be overruled," "that a demurrer if defective in *part*, is bad for the *whole*, for it cannot be *split*." That although the decisions of the English courts are deservedly of great authority, yet the reasons in these alluded to, "the supposed hardship on a defendant, if he cannot avoid the expense of taking a copy of a *long* bill, if there chances to be a right to a discovery," and thereby making "the only question to be, whether the plaintiff should be put to the expense of a bill, or the defendant of a new demurrer," are not convincing ; for if the defendant, instead of a *general* demurrer to

ALBANY.

Le Roy
v.
Servis.

the whole bill will demur particularly to each separate or distinct part or matter, to which he may suppose "he ought not to put in an answer," the demurrer may be overruled as to some parts or matters, and allowed as to others; and the defendant, among other costs, may be decreed the expense of so much of the copy of the bill, to which the demurrer was allowed; so, that there will not, in that respect, be any hardship left on him. It may be also stated, that there are other means, and within the powers of the court, to correct the mischief, if it prevails, of filing bills of an undue length, containing matters to which the defendant ought not to answer, preferably to merely *turning the plaintiff round*, and subjecting him to the delay and expense of a new bill. The conclusion, therefore, is, that there hath not appeared to us sufficient reason to change an established and approved practice; and, consequently, if there are any matters in the bill, to which the defendants ought to have put in an answer, the demurrer being *general*, and to the whole bill, must be overruled in the *whole*. This leads to an examination of the several causes of demurrer.

First cause of demurrer.—The defendants object to the proof as arising from the affidavit of the complainant, *Boon*; 1st. That there is only the oath of *one*, whereas there ought to be an oath from *every* of the complainants; 2dly. That the oath ought not only to state the destruction of the supposed writings, but also that the deponents have them not in their own possession; and 3dly. That the deponent doth ~~not~~ swear from his *own* knowledge, but from the information of *others*. Here I state that the proof of

ALBANY.

Le Roy

v.

Servis.

the allegation of the loss of the writing is restricted to the oath of the party, in exclusion of the oath of a stranger ; and, therefore, if the circumstances of the case are such, as that it is to be presumed the party cannot know the facts from his own knowledge, he must then, from necessity, be admitted to testify from the *credible* information, or in other words, from the hearsay of *others* ; that, whenever the law admits hearsay testimony, the fact is then as competently thereby proved and established, as if the person giving testimony, was to testify from his own knowledge ; that, whenever a person swears from the credible information of others, it not only implies that he hath inquired to an extent, and in a manner, to produce a rational belief, that the fact is as he testifies it to be, but it also excludes the supposition that he hath any reason even to *suspect* it to be otherwise ; that, a distinction is to be taken between the cases, where the writing is so lost, only, as that it cannot for the present be found, yet is supposed still to exist, and the cases where the writing is wholly destroyed, and, therefore, supposed *not* to exist ; and that, although in some of the former cases, it may be proper, in order to guard against evasion, to require the party to swear also, that he hath not himself the writing in his possession, yet, that in the latter cases, it would be altogether a useless accumulation of proof ; it would be to require proof of another proposition of fact, which follows as a necessary logical consequence from one already proved. Assuming it, therefore, and which, I think, cannot be questioned, that the present is one of the cases in which proof from the information, or hearsay of others, is to be received, then the fact, of the de-

ALBANY.

Le Roy

v.

Servis.

struction of the supposed conveyances, from the original patentees to Sir *William Johnson*, is duly and competently proved; and, consequently, the affidavit of the complainant, *Boon*, alone is sufficient, so that the first cause of demurrer fails.

Second cause of demurrer.—It must be admitted, that there cannot be a more sound or salutary principle than the one on which this cause of demurrer proceeds; that a court of equity should always withhold its aid and countenance from a suitor, whose conduct appears in any part, such as a conscience rightly informed, cannot approve: but the principle is not applicable to the present case. The supposed illegality of the agreement between the original patentees and Sir *William Johnson*, consists in its being in contravention of the instruction from the king to the governor, restraining the patents for lands, to quantities not exceeding 1,000 acres to each patentee. The futility of this regulation was soon discerned, and the instruction was, for not much less, if any, than half a century before the patent mentioned in the bill issued, considered altogether as a dead letter, and the compliance with it a mere matter of form.—But, even conceding that the legality of an agreement, similar to the one supposed to have taken place between the patentees and Sir *William Johnson*, might be made a question, yet that could only be the case where the agreement was *before* the Indian purchase; because, immediately on the purchase, the king, in whose name these purchases were always made, became trustee for the persons to whose use they were made, and the trust, possibly on *artificially legal* principles, might have been limited to a

ALBANY.

Le Roy
v.
Servis.

quantity not exceeding the rate of 1,000 acres to each person. The several *cestui que trusts*, however, had an equitable interest in their respective shares, which they could legally assign, and agree to vest the title at law in the assignees, on the issuing of the patent; and, as it doth not appear when the agreement in the present instance was made, in respect to whether *before* or *after* the Indian purchase, the illegality of it cannot come under consideration on the defendants' demurrer. It was a matter of which they could avail themselves by plea only, with the requisite averments supplying the uncertainty of the bill, as to the *time* when the agreement was made.

Third cause of demurrer.—The answer which has been given to this cause of demurrer is, that it was not requisite for the defendants, in answering the bill, to declare, either that there was an adverse possession, or if there was, then that the defendants *knew* it; but, that it would have been sufficient, if they had simply admitted, that their vendors were not, at the time of purchase by them, the defendants, in possession; because, whether the possession was vacant, or whether it was adversely held by others, and if the latter, whether the defendants knew it, which ever might have been the fact, was wholly immaterial. This answer, it must be owned, is far from being unsatisfactory; at the same time, the principle, *that a man is not held to accuse himself*, is so estimable, that we cannot be too cautious in admitting distinctions or qualifications of it. Therefore, and especially as the discovery sought for in this instance, is of a fact altogether useless in the complainants'

case, I should have supposed it more safe, if a particular demurrer had been put in to that part of the bill, to have allowed it, and ordered the allegation and interrogatory which the demurrer supposes to be exceptionable, to be struck out of the bill.

ALBANY.

Le Roy
v.
Servis.

Three last causes of demurrer.—I shall consider these causes together, for I am not persuaded they might not all have been shown under the last, the general cause of demurrer, they being essentially the same, amounting to a denial that the court ought to grant a relief, supposing all the allegations in the bill to be confessed, which is only saying in other words, *there is a want of equity*. I here remark, that it is ordinarily premature, wholly to dismiss a bill on a demurrer for this general cause, and so, as it were, at the threshold, unless the complainant's case is, from his own showing, radically such, that no discovery or proof can possibly make it a proper subject of equitable jurisdiction. Such was the late case of *Munro* and others, appellants, v. *Allaire*, respondent, decided in this court, where the complainant came to have a purchase of lands perfected and confirmed to him, the supposed sale being made by trustees under a will, and he being one, and not alleging himself also a *cestui que trust*, one of the legatees to whom the money arising from the sale was to be paid, and that he, although a trustee, was obliged to purchase, in order to avoid the loss to himself as a *cestui que trust*, by a sale at a less price : for it is to be remarked, that a defendant doth not forego or waive a single advantage as to the merits, or the point, whether the complainant hath equity, by not demurring. He may equally insist on the same

ALBANY.

Le Roy
v.
Servis.

matters, by way of answer, which he might have done by demurrer, and if he should even omit them in the answer, he may still avail himself of them in argument on the final hearing of the cause ; my opinion, therefore, is, that the bill ought to have been retained, and that the court of chancery should have reserved itself on the question—whether the complainants were entitled to any, or what relief,—until all the proofs, either as arising from the answers of the defendants or otherwise had come in ; and, consequently, that the several decrees allowing the respective demurrers of the respondents, and dismissing the appellants' bill, be reversed. The respondents have not only put in separate demurrers, but they have also proceeded separately to decrees. How far, or by what means, a court of chancery ought to restrain and regulate the right of defendants to *sever* in their defence, so as to prevent them from availing themselves of it solely to vex the complainants, are matters in which I forbear from an opinion in my place in this court, because it is unnecessary : We can only declare and establish what shall be the consequences of an unnecessary severance, if there should afterwards be an appeal and a judgment of reversal for the complainants. This may, in some measure, prevent the abuse alluded to. My opinion, therefore, further is, that *each respective* respondent in the present appeal, be decreed to pay the appellants for their costs on the appeal, a sum to the same amount, which would have been decreed to be paid by them *all jointly*, if they had joined in demurrer in the court below.

DECREED.*

ALBANY.

Munro and
others
v.
Allaire.

* 14th March,
1798.

ON hearing counsel on this appeal, it is adjudged, ordered and decreed by this court, that the several decrees of the court of chancery therein complained of, allowing the separate demurrers of the respondents respectively, to the bill of complaint of the appellants, against the respondents, and the other defendants in the bill named, and that the said bill, as it respected each of the respondents, should be dismissed, be reversed ; and further, that the respondents severally pay to the appellants, the sum of 30 dollars for their costs on this appeal, in respect to each respective decree so reversed, and that the cause be remitted back to the said court of chancery, and that there, such further proceedings shall be thereupon had, as well for execution of this judgment, order, and decree, as otherwise, as shall be agreeable to equity and justice.

Peter Jay Munro, Benjamin Griffen, Isaac Sniffin, and Mary Palmer, the younger, Appellants, against Peter Allaire, Respondent.

PETER ALLAIRE, of *Marmaroneck*, in the county of *Westchester*, the respondent in this cause, filed his bill of complaint, some time in the year one thousand seven hundred and ninety-five, against the above named appellants, and therein stated, that *Benjamin Palmer*, late of *Marmaroneck* aforesaid, being seised and possessed of certain *real*

cannot be maintained, but it seems that a purchase by a trustee, who is also a *cestui que trust*, may, if to save the property from loss, be sustained.

A purchase by an executor, who has a power to sell for the benefit of a third person, from his *cestui que trust* is not favoured in equity, and a bill by him for a specific performance

is also a *cestui*

ALBANY.**Munro and
others
v.
Allaire.**

and *personal* estate in the said bill mentioned, executed his last will and testament, in due form of law, and thereby directed his executors to sell and dispose of his estate, real and personal, *within one year after his decease*, to pay all his just debts and funeral charges, and as to the remainder and residue of the monies arising from the said sale, of his real and personal estate, he gave and bequeathed unto his son, *Thomas Palmer*, eighty pounds, to be put out at interest by his executors, until he attained the age of twenty-one years; that the interest thereof, should be paid annually to his wife, and should his son die before he attained the age of twenty-one years, he gave the said sum of eighty pounds to his said wife, *Mary Palmer*, one of the appellants, and devised all the residue and remainder of his estate, both real and personal, (that might come into the hands of his executors) unto her, her heirs, executors and assigns *forever*, to do with as she should think meet—and appointed his said wife, executrix, and the said *Benjamin Griffen*, and the said *Peter Allaire*, executors of the said will.

The bill further stated, that the said *Benjamin Palmer*, died without altering or revoking his will; that the appellant, *Benjamin Griffen*, and the said *Peter Allaire*, proved the same; that the appellant, *Mary Palmer*, refused to prove the will, or intermeddle with the said estate, as she was not able to read or write; that soon after this, the appellant, *Isaac Sniffin*, wanted to purchase her right in the said estate, and offered for it, four hundred and fifty pounds; that the appellant, *Benjamin Griffen*, advised the taking of that sum; that the said *Mary Palmer*,

was willing to take that price, if no more could be obtained ; that the said *Peter Allaire*, was desirous of purchasing ; that a long treaty for that purpose took place, in which judge *Tompkins* was consulted, as the *friend* of the said *Mary Palmer* ; the proceedings on which consultation the said *Peter Allaire* stated by his bill, were fairly conducted on his part ; that articles for the said purchase, at the price of six hundred pounds, were executed by the said *Peter Allaire*, and the said *Mary Palmer*, and afterwards, the following conveyance was made to him, by her, of all her right, title and interest in the estate of her said husband ; she promising to give a better conveyance, if that should be found defective.

The indenture set forth, that *Mary Palmer*, for and in consideration of the sum of six hundred pounds, remised, released, and forever quit-claimed, and by these presents, made on this occasion, “ did remise, release, and forever quit-claim, unto the said *Peter Allaire*, and to his heirs and assigns, all her right, title, interest, claim, dower, or title of dower whatsoever, which she the said *Mary Palmer*, now has, may, might, should, or of right ought to have, or claim of, in, or out of all and every, the messuage, lands, tenements, and hereditaments, goods and chattels, which were belonging to the said *Benjamin Palmer*, the younger, her late husband, which were devised to him, by the last will and testament of *Benjamin Palmer*, the elder, and *Mary Palmer*, deceased, excepting the sum of eighty pounds,” before mentioned, left as aforesaid, to *Thomas Palmer*, with remainder to *Mary*, his mother, “ and all manner of action and actions, writ or

ALBANY.

Munro and
others
v.
Allaire.

ALBANY.

Munro and
others
v.
Allaire.

writs of dower, whatsoever, so as neither she the said *Mary Palmer*, nor any other person for her, or in her name, any manner of dower, or writ of action of dower, or any right or title of dower, of, or in the said messuage, lands, tenements and hereditaments, or of, or in any part or parcel thereof, (except as before excepted) at any time hereafter, shall, or may have claim, or prosecute against the said *Peter Allaire*, his heirs or assigns."

The said bill further stated, that he, *Peter Allaire*, had executed a bond and mortgage to the said *Mary Palmer*, conditioned for the payment of three hundred and twenty pounds, part of the said purchase money ; that the testator's debts were estimated at two hundred pounds, to discharge which, and pay *Mary Palmer* the overplus, (if any) and also for the securing the said sum of eighty pounds, and the interest thereof, he, the said *Peter Allaire*, delivered another obligation to the said *Mary*; that she gave him a bond to refund, if the debts should prove greater than what they were estimated at, and together with the appellant, the said *Benjamin Griffen*, promised to execute a deed in trust for him, of the testator's property.

That he, the said *Peter Allaire*, had advertised for the creditors of the testator, to bring in their accounts to him, and had paid several, particularly to the appellant *Benjamin Griffen*, several accounts, which had been before paid by the said *Benjamin Griffen*, and that the price of six hundred pounds, was the full value of the said real and personal estate.

ALBANY.

Munro and
others
v.
Allaire.

The bill further stated, in substance, that the appellants, *Isaac Sniffin* and *Peter Jay Munro* having notice of the premises, had procured a subsequent conveyance for the said real and personal estate from the said *Benjamin Griffen* and *Mary Palmer*, who qualified herself as an executrix for that purpose.— That the appellants, *Peter Jay Munro* and *Isaac Sniffin*, or one of them, indemnified her for such conveyance. That the said *Peter Jay Munro* had possessed himself of a great part of the real and personal estate of the testator, and refused to account for the personal estate to the said *Peter Allaire*, or to let him into the possession of the real estate. The bill, therefore, prayed, that the said *Peter Jay Munro* might account for such part of the personal estate of the said *Benjamin Palmer*, as had come to his hands; for a specific performance of the agreement made between the said *Peter Allaire* and *Mary Palmer*; to receive a more perfect assurance and conveyance of the estate of the said *Benjamin Palmer*, deceased, and to receive to such other and further relief as the nature of his case might require.

To this bill the appellants, *Isaac Sniffin* and *Mary Palmer*, filed their general demurrer for want of equity as against them. The appellant, *Benjamin Griffen*, also demurred for the same reason, to so much as respected the real estate of the testator, or demanded any relief against him relating thereto; answering, nevertheless, that he never had agreed to convey the said real estate to the said *Peter Allaire*; and that the said *Peter Allaire* never paid any of the testator's debts, except some trifles, amounting to about two pounds, six shillings, which were discharged with

ALBANY.

Munro and
others
v.
Allaire.

money received by the said *Peter Allaire*, from the sale of a part of the personal estate of the testator. The appellant, *Peter Jay Munro*, also demurred for the same cause, to so much of the said bill, as respected the said real estate; but answered, that he had never possessed himself of any part of the personal estate of the testator, nor taken any conveyance or assignment of the same.

Upon these several demurrers the cause came on to be argued in the said court of chancery, when his honour the chancellor was pleased to direct and order, that the demurrers should be overruled, and that the appellants should answer fully to the said bill; from which orders and directions the appellants severally appealed.

1st. Because the said *Peter Allaire* as a trustee and executor, could not be a purchaser under the testator's will, of the said real or personal estate, nor was the said *Mary Palmer*, at the time of making the said pretended sale, in capacity to do any act which could affect the real estate of the said testator.

2d. Because the other executors named in the said will, could never give a valid conveyance for the same to the said *Peter Allaire*.

3d. Because the testator's creditors did not appear to have been satisfied, nor his son's annuity paid; but on the contrary, according to the said *Peter Allaire's* own showing, neither the one nor the other had been done; neither had any of the said creditors, nor had the said legatee consented to the said pretended sale to the said *Peter Allaire*, or to look to him, alone, for their demands.

4th. Because the *heir* of the said testator was not a party of the said bill.

5th, Because, as to the testator's personal estate, there was no charge that the same had come to the hands of the said *Benjamin Griffen*, *Mary Palmer*, or *Isaac Sniffin*, nor was any account thereof requested from any of them. And the said *Peter Jay Munro* had, by answer, fully cleared himself of any concern with the same, even if the said *Peter Allaire* had a right to demand an account of it.

ALBANY.

Munro and
others
v.
Allaire.

6th. Because, as the said *Benjamin Griffen* denied any promise to the said *Peter Allaire* for that purpose, he could not be bound to execute a conveyance to him.

7th. Because, as the bill was framed, the scope thereof against all the defendants therein, was a specific performance and confirmation of the said *Peter Allaire's* title, which the appellants could not give, and he had no right to demand. And the general prayer of relief at the conclusion of the bill, could not operate so as to depart from the general purview of the statement of his case.

The respondent referred himself to the case made by the appellants, and the pleadings filed in the court of chancery, and humbly insisted, that the orders and directions appealed from, should be affirmed for the following reasons :

1st. Because the said *Benjamin Palmer* having, by his said will, given only a naked authority to his executors, to sell his real and personal estates, in order to pay all his just debts and funeral expenses, and a legacy to his son *Thomas Palmer*, and having bequeathed the residue of his estate to the said *Mary Palmer*, there was no necessity for the executors to

ALBANY.

Munro and
others

v.

Allaire.

sell the real estate at all; provided, the said debts and legacy were paid.

2d. Because *Mary Palmer*, being the residuary devisee and legatee, could sell her interest under the will, to the said *Peter Allaire*, or to any other person.

3d. Because the said *Peter Allaire* would not be considered as a trustee for the said *Mary Palmer*, until a sale by him, and the executors of the said real estate, and even then, he might take from her a release of her interest to the property which had, or might come to his hands.

4th. Because it is not necessary, that the other executors in the will should join in the conveyance with the said *Mary Palmer*, to the said *Peter Allaire*, the bill only praying a specific performance of her agreement with the said *Peter Allaire*.

5th. Because the said *Mary Palmer* was guilty of a fraud, in selling her interest in the estate, to *Isaac Sniffin*, perhaps, too, for a smaller sum, after she had already agreed to sell it to the said *Peter Allaire*, who had paid her for the same.

6th. Because it appears that the said *Peter Allaire* had retained in his hands, monies sufficient to pay the creditors and the legacy of the testator's son; and the decree below might have been so framed, if necessary, as to compel him to satisfy those demands, before the said *Mary Palmer* had perfected her title.

7th. Because the consent of the creditors and the testator's son was not necessary to the sale of *Mary Palmer's* interest in the estate, inasmuch as they could not be injured by it, the said debts and legacy

remaining a charge upon the land, notwithstanding such alienation by the said *Mary Palmer*.

ALBANY.
Munro and
others
v.
Allaire.

8th. Because the whole residuary estate being given to the said *Mary Palmer*, it was unnecessary to make the heir at law a party. If the bill was defective in that respect, it might be cause for a special, not a general demurrer; besides, the chancellor could, in any subsequent stage of the cause, have ordered the heir at law, if he had judged it necessary, to be brought before the court.

9th. Because there being a general prayer for relief, any remedy, suited to the respondent's case, might have been afforded. For instance, the court might have ordered the bond and mortgage, given by *Allaire* to *Mary Palmer*, to be delivered up to be cancelled, or it might have ordered the said *Peter Jay Munro* to join the said *Mary* in perfecting the respondent's title, or it might have ordered the deeds to the said *Isaac Sniffin* and *Peter Jay Munro*, to be cancelled, and awarded, if necessary, a perpetual injunction to the *executors* against selling.

10th. Because, if the said bill does not charge the said *Benjamin Griffen*, *Mary Palmer* or *Isaac Sniffin* with receiving any of the testator's personal estate, such allegation was unnecessary, or if the bill be defective here, it was sufficiently complete in other respects, not to be dismissed on a general demurrer.

BENSON, J. This is an appeal from the orders of the court of chancery, overruling the several demurrers of the appellants' to the respondent's bill.

The intent of the respondent's bill in the court of chancery is, that he may have a specific performance of

ALBANY.

Munro and
others
v.
Allaire.

his agreement with the appellant *Mary Palmer*, whereby she bound herself to convey to him, by good and sufficient conveyances in the law, all her estate, right, title and interest whatever, to the estate of her late husband, and that he may receive a more perfect assurance and conveyance of the said estate.

To that end, the other appellants are also brought into court, either as confederates with her, or as subsequent purchasers from her with notice. Several questions have been raised and argued by the counsel on both sides. An opinion by the court on each of these questions, would be unnecessary. It is, therefore, to be forborne, it being sufficient for a decision against the respondent, that he had at any time, as a trustee, a power over the property so agreed to be conveyed, and whether this property existed in the shape, either of money or of land, makes no difference. The demurrers by the appellants, therefore, were well taken, it being a principle, *that a trustee can never be a purchaser*; and, I assume, it as not requiring proof, that this principle must be admitted, not only as established by adjudication, but also as founded in indispensable necessity, to prevent that great inlet of fraud, and those dangerous consequences which would ensue, if trustees might themselves become purchasers, or if they were not, in every respect, kept within compass. Although it may, however, seem hard, that the trustee should be the only person of all mankind who may not purchase; yet, for the very obvious consequences, it is proper the rule should be strictly pursued, and not in the least relaxed.

ALBANY.

Munro and
others
v.
Allaire.

Therefore, far from discerning the respondent's case as an exception, supposing the rule to be only general and not universal, I would remark, that, notwithstanding the averment in the bill, that *Mary Palmer* fully understood the agreement and conveyance, and, independent of the circumstance that she was not able to read or write, whoever will merely look at the conveyance, which is set forth at large in the bill, will instantly perceive that the parties, or other persons who are named in the bill, as friends or agents in the transaction, did not know what she had by the agreement, agreed to convey; whether an estate in the land, or her eventual interest in the money to arise by the sale of the land; or in what manner, or to what extent these acts were susceptible of effect, or even whether they were not altogether nugatory. The conduct of the parties, and every other person having any other agency in a bargain so made, without due knowledge or advertisement, is, to say the least of it, indiscreet, irregular, unfit, and certainly to be discountenanced. I am, therefore, satisfied of the justness of this principle, that a court of equity ought never to *aid* a party to have the bargain enforced or perfected, with intent that any profit or advantage should be taken by it; the interposition of the court, if any, should be only to *avoid* or relieve against a loss or damage.

The principle, as quoted from the adjudications, is in terms without qualification or exception. A trustee can *never* be a purchaser, &c. and without some explanation, I may, possibly, be considered as understanding it in its apparently absolute sense. I will, therefore, briefly mention, that the cases, where the suit is *against* the trustee to set aside a purchase,

ALBANY.

Munro and
others

v.

Allaire.

he having procured the requisite formal legal title, are to be distinguished from those where the suit is by him to effectuate a purchase, either by having the thing purchased, decreed to him specifically, or by having the *means* decreed to him, whereby he may *recover at law*. That in the latter case, it appears to me, that the rule is to apply as unlimitedly as it is expressed ; but that in the former case, a court of equity will not always interfere, as of course ; for, if the *cestui que trusts* will agree to allow the purchase, it may be allowed without fear from the precedent ; and that it is not, in every instance, indispensable that all the *cestui que trusts* should agree to waive the implied fraud ; it may be sufficient for a majority, or such other number or proportion of them to agree, as that, according to the circumstances of the case, it may be presumed there was no fraud in fact. It only remains to be noticed, that if the agreement and conveyance are to be without effect, *Mary Palmer* ought not to retain the bond and mortgage against the respondent. She is, nevertheless, entitled to hold them, until he shall make her an offer to relinquish the agreement, and to deliver up the conveyance he now holds against her to be cancelled. It is not possible for the respondent to *allege* an offer to that purpose, and to conform the prayer of his bill and his petition to it, in consequence of any answer which the appellants could be compelled to make to the bill, and it is a rule, that every decree must be according to the form of the petition ; so that, if the respondent is to be relieved against the bond and mortgage, he must proceed *de novo*, and as he shall be advised.

My opinion, is, that the order appealed from be reversed.

DECREE. Whereupon,* the court thereupon do order, adjudge and decree, that the orders therein complained of be reversed, and that the demurrers of the appellants to the respondent's bill stand allowed. That the respondent pay to the appellants their costs in respect to the said appeal; that the respondent's bill, as to the appellants, *Isaac Sniffin* and *Mary Palmer*, the younger, be dismissed with costs; that the respondent pay to the appellants, *Peter Jay Munro* and *Benjamin Griffen*, their costs in respect of their demurrers; and that the court of chancery give all necessary directions for carrying this judgment into execution.

ALBANY.

Lewis
v.
Burr.

* 20th March,
1796.

And it is further ordered, that in respect of such matter in the respondent's bill, to which the appellants, *Peter Jay Munro* and *Benjamin Griffen*, have answered, the cause be remitted to the court of chancery, there to be proceeded in, as between the respondent and the said *Peter Jay Munro* and *Benjamin Griffen*, as shall be just.

Judgment of reversal.

(SUPREME COURT, 1796.)

Lewis against Burr.

THIS was an action of assumpsit, determined by the supreme court.

The suit was by the plaintiff as indorsee, against the defendant as indorser, of a promissory note, made by *Roger Enos*, to him, dated the first of *June*, one thousand seven hundred and ninety-five, for three thousand five hundred dollars, payable thirty days after date. *Plea.* The *General Issue*.

The 4th of July is a public holiday, a note or bill, therefore falling due on that day, is payable on the third of the month.

ALBANY.

Lewis.
v.
Burr.

The special verdict finding the note and the indorsement of it by the defendant to the plaintiff, and then the following facts, was as follows, " that on the third day of *July*, in the year aforesaid, the said three thousand five hundred dollars, in the said note mentioned, or any part thereof, being no ways paid, the said *Francis Lewis*, by his agent, *Solomon M. Cohen*, made diligent inquiry and search for the said *Roger Enos*, in the said city and county of New-York, and especially at his usual place of abode, in the said city, to the intent to request him to pay to the said *Francis Lewis*, the said three thousand five hundred dollars, in the said note contained, according to the tenor of the same, but the said *Roger Enos*, was not then to be found, being absent from the said city and county, in parts to the jurors unknown ; that the said *Roger Enos*, continued absent from the said city and county, thenceforth, until after the fourth day of *July*, in the year aforesaid ; that the said *Francis Lewis*, not finding the said *Roger Enos*, to make the said request, did, on the said third day of *July*, in the year aforesaid, by his agent aforesaid, deliver to the said *Aaron Burr*, a paper writing, subscribed with the proper hand-writing of his said agent, in the words and figures, following, to wit :

" *New-York, 3d July, 1795.*

" SIR—As general *Enos*, is not in town, and his note with your indorsement for 3,500 dollars, is payable to-morrow, the 4th inst. the holder desired me to give you this notice, that he looks to you for payment of the same ; and I undertake this to prevent a protest ; general *Enos* is expected daily when he will have cash sufficient to discharge the same, as I

am credibly informed ; I hope my conduct in this business, will meet with your approbation ; which will be very pleasing to

Sir,

your most obedient servant,

SOLOMON MYERS COHEN."

" And the jurors aforesaid upon their oath aforesaid, further say, that the 4th day of *July* in each year is the anniversary day of the declaration of the independence of these *United States of America*, and for that reason is in practice, though not by law, generally observed by the citizens of this state of *New-York*, as a public festival ; and, also, that some time in the month of *May*, in the year of our lord 1784, upon the institution of the bank of *New-York*, which does no business on any 4th day of *July*, it became and since continually has been, and still is a general practice and usage in the said city of *New-York*, for the holder of a promissory note made by one person and indorsed by another, if the same become payable, allowing three days of grace, on the 4th day of *July*, in any year, to demand payment from the maker of such note, of the sum therein mentioned, on the 3d day of the same *July*, and if he refuse to pay the same, or if he cannot be found, to the end that payment may be demanded of him, and if the said holder shall be minded to look to the said indorsor for payment of the said note ; then, forthwith, that is to say, on the same 3d day of *July*, to give notice to the said indorsor, of such refusal to pay the sum mentioned, in the said note, or that the maker thereof cannot be found, to the end that payment may be demanded of him, and also, that it is the intention of the said holder to look to the said in-

ALBANY.

Lewis
v.
Burr.

ALBANY.

Lewis

v.

Burr.

dorsor for the payment of the said sum. But whether, &c.

Per Curiam, by BENSON, J. By our statute of the 27th *March*, 1794, "promissory notes are made assignable and indorsable over; and an action may be maintained on them, as in cases of inland bills of exchange."

The reference to bills of exchange is contained in the English statute of the 3d and 4th Anne; but having been omitted in the colonial statute of 1773, it was also omitted in the statute of 1788, in our revised code; the omission, therefore, in the statute of 1788, can be accounted for. But whether it was in the first instance designed or accidental in the statute of 1773, cannot be ascertained. It, however, occasioned the statute of 1794, which, it is known, was intended, and has been received and practised on in the community, as a provision, in addition or amendment of the statute of 1788, to give days of grace to promissory notes; hence it is, that they are now considered as entitled to this incident, by law. The *law*, however, does not *create* the incident; it existed before, as appertaining to bills of exchange, and the law can only be adjudged as *constructively extending* it to promissory notes, it however existed by force of custom only; to know, therefore, what the incident is, we still resort to custom.

Days of grace, as a general incident to bills of exchange, are by almost universal custom; the number of days being different in different places, according to their respective laws or customs. In *England* the number is three, and wholly by custom.

There, also, if the last of the three days happens to be a day on which either the law or custom hath

established "that no money is to be paid," then the number is to be restricted to two. This is also not only wholly by custom, but is repugnant to the analogy of a rule of municipal law, by which, if an act is to be done on a day which happens to be a Sunday, or any other day on which it could not be done, without transgressing the law, that then, instead of the day *before*, it must be done on the day after; so that the regulation of restricting the period of respite in favour of the creditor, preferably to enlarging it in favour of the debtor, if it had been questioned in its commencement, I should conceive, ought to have been arrested by the courts of justice, not as inconvenient or injurious in itself, but as repugnant to the rule of law in analogous cases; it having, however, been sanctioned by custom, it was, therefore, judicially "approved;" *consuetudo altera lex*.

I assume it, that the custom, as it existed in *England* at the time of our revolution, was deemed, in fact, to be the custom among us, and entitled to prevail. In addition to the custom, as it then existed, the special verdict finds a continued custom from the month of *May*, 1784, hitherto for another day, besides Sunday, &c. when the restriction of the number of days of grace is to take place, namely, the anniversary of our independence. The question, therefore, between the parties is, whether the custom is not, in this particular, also equally entitled to prevail? with respect to which, I would briefly state that, whenever a practice, usage or custom hath obtained, for a length of time, so as that it may be presumed to be generally known; that then, all contracts to which it may be applicable, shall be inter-

ALBANY.

Lewis
v.
Burr.

ALBANY.

Cortelyou

v.

Lansing.

preted and governed by it. This principle is not new ; we practise on it daily. Where the contract is not special or explicit, so as to exclude construction, the inquiry always is, what is usual ? Lest I may be misunderstood, I would mention, that I mean such practices, usages, or customs only, as may consist with law ; that I decide only on their force or authority, admitting the object of them to be lawful.

I am of opinion, that the note in question is to be adjudged as having fallen due on the 3d day of *July*, the *second* day of grace, and, consequently, that the plaintiff is entitled to recover.

(SUPREME COURT.)

Cortelyou *against* Lansing, administrator of Antill.

On the deposit of a pledge, where no day of redemption is limited, the right of redemption descends to the personal representatives of the pawnor ; if the pawnee sell the pledge before application to redeem, he is answerable for the value of the pledge at the time of the application, and it is not necessary in such case to make an actual tender of the balance due.

THIS was an action of assumpsit, under the following circumstances. On the 29th *April*, 1786, *Antill* deposited with the defendant a depreciation note, taking from him a receipt in these words :— “ Received of *E. Antill*, as a deposit, to remain in my hands his depreciation note, dated 1st *January*, 1781, No. 26, said to be for the value of 2,629 dollars and 48 cents, which note is to delivered up upon the payment of 600 dollars, with lawful interest, lent and advanced by me to the said *E. A.* on the 24th *September*, 1783, or upon giving such other security as will be acceptable for the whole, or such part as may be found due upon a future settlement.”

On the 1st *January*, 1785, the defendant received on account of the 600 dollars, 125 dollars, and on 9th *October*, 1788, he sold the certificate for 625 dollars being the highest market price that could

be obtained for the same, leaving a balance of 39 dollars and 62 cents due to him on that day.

ALBANY.

Cortelyou

Lansing.

In 1791 or '92 *Antill* died, and administration being granted to the plaintiff, he, in 1799, went to the house of the defendant, for the purpose of demanding the certificate, but in consequence of the defendant's incapacity to attend to business, from mental derangement, he could not be seen. There was no evidence that the plaintiff had any money at the time to tender to the defendant.

At the trial, the court charged the jury on this evidence, that the demand of damages was a question of law, but that the plaintiff was entitled to recover ; and, that the only rule of damage was the value of the certificate in 1799, together with interest from that time. The jury found accordingly, subject to the opinion of the court on the above case.

Per Curiam, delivered by KENT, J. The points relied on by the defendant are,

1. That he had a right to dispose of the certificate.
2. That the pledge had become absolute by the death of the pawnor.
3. That a tender of the money was requisite before suit.
4. That the rule of damages was subject to the discretion of the jury.

The two first questions raised in this case, respect the rights of the parties over the depreciation note thus deposited with the defendant ; the one claiming a right to redeem, and the other to sell it ; each reciprocally denying the other's pretensions. But the

C c

ALBANY.

Cortelyou
v.
Lansing.

books involve the inquirer in considerable doubt and difficulty in the discussion of these questions, nor do the English courts appear to have defined and settled them with their usual accuracy and precision.

* *Dig. lib.* 13. tit.
7. § 9. 1 *Hab.*
291. § 15 —
Brooke's Abr. tit.
Ple ges. 20. 2
Vezey, jun. 378.
1 *Powell* on
Mort. p. 3. —
Bracton, 99. b.

The note in question came under the strict definition of a pledge.* It was delivered to the defendant with a right to detain, as a security, for his debt, but the legal property did not pass, as it does in the case of a mortgage, with a condition of a defeasance.— The general ownership remained with the intestate, and only a special property passed to the defendant. It is, therefore, to be distinguished from a mortgage of goods, for that is an absolute pledge, to become an absolute interest if not redeemed at a fixed time. Besides, delivery is essential to a pledge ; but a mortgage of goods is, in certain cases, valid without delivery.

The mortgage and the pledge, or pawn of goods seem, however, generally to have been confounded in the books, and it was not until lately, that this just discrimination has been well attended to and explained.

I find no difficulty in saying that the defendant had no authority to sell the pledge at the time he sold it. It was, at that time, an illegal conversion of the intestate's property. The pledge was delivered without any specified time of payment or redemption.— It was to remain in the defendant's hands to be delivered upon payment. The cases relied on by the defendant's counsel admit, that in such a case, the pawnor has his whole life-time to redeem. If this be so, the defendant had no right to sell during the pawnor's life ; because the one right would be inconsistent with the other. The expression, however,

that the pawnor has his life, as a time to redeem, where no time of redemption is fixed, must be taken with this qualification, that the defendant does not, in the mean time, call upon him to redeem.

ALBANY.
Cortelyou
v.
Lansing.

This he certainly must have a right to do. The manner in which that call is to be made; and, in case of the pawnor's default, the manner of disposal of the pledge, are distinct points which I need not now discuss; because, in the present case, no call whatever was made upon the intestate, previous to the sale of the note. There is no instance to be found, in case of a deposit, for an indefinite time, where the pawnee sold in the life-time of the pawnor, and without making a previous demand, that such sale was held good. The sale by the defendant was, therefore, clearly unauthorised and illegal.

The next, and the more difficult question is, whether the representatives of the pawnor have a right to call upon the defendant to restore the pledge or its equivalent. That the intestate had such a right is not to be disputed, and the point is, whether it be such a right of action as died with the person, or whether, as in all other cases of a right in action, not founded on a personal tort, it descended to the plaintiff. If the right of action did not descend, this will be the first case, I apprehend, that ever existed, in which the remedy for the conversion of one's property, was limited to the life-time of the party injured. But it is said to be immaterial, what was the defendant's conduct in respect to the pledge, since where no time was fixed, the pawnor must redeem in his life-time, and if he dies without redeeming, the property in the pledge becomes absolute in the

ALBANY.

Cortelyou

v.

Lansing.

pawnee. This last proposition has so much countenance in the books, that to determine on its validity it will be necessary to bestow a considerable attention to the cases, and if I am not greatly mistaken, the result will show that it is wholly destitute of any solid foundation.

Glanvil, the earliest of our juridical classics, has treated the subject with a precision not to be found in the authorities of a subsequent period, and with a perspicuity and simplicity that bespeak a writer of a primitive age. A loan* he observes, is sometimes made on the security of a pledge (*sub vadii positione*) and the pledge may consist of chattels, lands or rents.† Sometimes, possession is immediately given of the pledge, on receipt of the loan, and sometimes it is not. Sometimes the thing is pledged for a term, and sometimes without. When a chattel is pledged and possession is given, and for a certain term, the creditor is bound to keep the pledge safely, and not to use it to its detriment. If it be agreed that in case the debtor should not redeem the pledge at the end of the term, the pledge shall remain with the creditor as his own property, the agreement must be observed. But if there be no such agreement, and there be a fixed time of redemption, and the debtor make *delay* in payment, the creditor may quicken the redemption by a writ (of which he gives the form) and which requires the debtor without delay to redeem (*acquietet rem quam invadiavit*) the pledge.

On the return of the writ, if the defendant confessed the pledge,‡ he was commanded to redeem in a reasonable time, and on default, the

* *Glanvil*, lib. 10.
c. 1. p. 59.

† 1 *Reeves*, 161.

‡ *Ib.* 162.

creditor had license to treat the pledge as his own.— But if the pledge was made without mention of any particular term,* the creditor might (*debitum petere*) demand his debt at any time and the debt being discharged, the creditor was bound to restore the pledge without any deterioration.

ALBANY.

Cortelyou

v.

Lansing.

* 1 Reeves, 163.

This authority establishes two points.

1st. That if the pledge was not redeemed by the time stipulated, it did not then become absolute property, in the hands of the pawnee, but the pawnee was obliged to have recourse to the *aula regis*, and to sue out an original writ, in order to obtain authority to dispose of the pledge.

2d. That if the pledge was for an indefinite term, the creditor might, at any time, call upon the debtor to redeem by the same process of demand. By what authority the judges in the time of *James I.* advanced a different doctrine on the subject, is not made to appear. The rights of the parties arising out of the case of a pawn, underwent, however, a considerable discussion in three several cases during that reign.

In the case of *Mores v. Conhem*,* 7 J. I. in C. B. it was resolved by the court, that a pawnee had a special property in the goods pawned, and might use the pawn, so that it was not to its detriment, and if he assigned over the pawn, the assignee would be subject to detain, if he detained the pawn after payment by the owner.

This decision was correct, and in harmony with the ancient laws, as laid down by *Glanvil and Bracton*.† It considered a pawn in its true light, as a mere deposit of a chattel to be detained as a secu-

† *Glanvil ut supra*, *Bracton*, 99 p.

ALBANY.

Cortelyou

v.

Lansing.

city, and that the general property was still in the pawnshop.

The next case is, that of *Sir John Ratcliffe v. Davis*, 8 J. I. in K. B. That was a suit in trover, and the special verdict stated, that the plaintiff had pawned a hat-band, set with jewels, unto one *Whitlock*, a goldsmith, for 25*l.* no day was set to redeem. The pawnee on his death-bed, delivered the pledge to the defendant, with a request to keep it till the money was paid, and then to deliver it to the plaintiff. The pawnee then died, and the plaintiff tendered the debt to his executor, who refused to receive the money, and then he applied to the defendant, and after a demand and refusal, brought his suit. The court gave judgment for the plaintiff; and of course decided all the points arising out of the verdict, which were, that the tender to the executor, was well made; that by the tender and refusal, the special property in the pledge, reverted in the plaintiff; that the general property had been constantly in him; that the death of the pawnee did not destroy the right of redemption; that refusal by the defendant after tender to the executor, was a conversion, and that the defendant had only the bare custody of the pawn.

This decision was in every respect reconcilable with the ancient law. It maintained without diminution, all the well known and settled rights of the respective parties; and had not the erudition of the judges (according to the taste of those times) carried them far beyond the record before them, and led them to discuss points, not relevant to the issue, we should, probably, never have heard of the present question.

ALBANY.

Cortelyou

v.

Lansing.

But in giving their opinions, one of the judges said, that executors might redeem a pledge, and that it would be assets in their hands. The other four observed, that if time be limited to redeem, the death of either party previous to the time, could not prejudice the right; but if no time was limited, the pawnor had his whole life, and if he died before he redeemed, the right was gone, and his executors could not redeem. It were to be wished, that the reasons of the judges had been more fully reported than we find them in this case.

In the case as reported in *Bulstrode*, the only reason stated is, that it would be very mischievous to compel the pawnee to keep the goods thus pawned, for such an indefinite time, when he hath paid sufficiently for them. But this objection would have been found to have had no validity, if they had only attended to the law as laid down by *Glanvil*, who says, as I have already stated, that where no time is fixed, the creditor might quicken his debtor's delay, and demand his debt at any time, the process for which he has given. From the case as reported in *Croke*, it is very questionable whether the court ever agreed in these extrajudicial *dicta*. He states that two of the judges held, that redemption could not be made after the death of the pawnor; for he, at his peril, ought to redeem in his time, as it is upon a mortgage; but that the others (and who were the majority) held otherwise, for that pledging doth not make an absolute property as in the case of a mortgage of land; but it is a delivery only until he pays, &c. So it is a debt to the one and a retainer of the thing to the other, for which there may be a re-de-

ALBANY.

Cortelyou

v.

Lansing.

mand at any time upon the payment of the money as the pawnee hath but a special property in the goods, to detain them for his security.

In *Yelverton* and *Noy*, the opinion of the court is, however, given as it is in *Bulstrode*, and the reason stated is, that the pledge is a condition personal, and extends only to the person of him, who pawned it.—Supposing, then, this to be the more correct report of the case, the ground of the opinion is equally unsound; a pledge is not a property created upon a condition of defeasance like a mortgage. It has no analogy to the case of a *right* which is absolute to vest, or to be defeated on the *happening of an event*, nor is it susceptible of that strict construction, unless it be so modified by the express agreement of the parties. Least of all is it a condition personal, to be performed exclusively by the pawnor. There is nothing of this in the nature of the contract, and in most cases, as when the time of payment is mentioned, it is agreed, that the right may remain perfect in the representatives of the parties.

* 2 Co. 79. the
lord Cromwell's
case. Dy. 139 a.

In feoffments of land, upon condition that the feoffee do an act, and no time be limited, there he hath only his life-time; but if his *heirs* be mentioned, the condition is not broken by his death; but extendeth to his heirs indefinitely without limitation of time, and cannot be broken except upon request made by the feoffor or his heirs.

If the naming of the heirs would, in this case, do away the limitation of this condition to the person of the feoffor, even according to the rigid construction that used to prevail, under the genius of the feudal

law over feoffments upon condition, surely it cannot be material that in personal contracts the executor should be named, for it is a general and well established principle, that they are affected equally as if named.

ALBANY.

Cortelyou

v.
Lansing.

This notion of a pledge, resting upon the performance of a condition, to revest the right as in the case of a mortgage, probably led to the decision in *Capper v. Dickinson*, K. B. 13 Ja. 1.* That if goods pawned for a time limited, be not redeemed at the day, they are forfeited and may be sold at the will of the pawnee.

* 1 Rol. Rep.
315.

This doctrine is also held by justice *Dodderidge*, in his office of executors, he says the pawnee may dispose of it at his pleasure.† This last decision not having any direct application to the present case, may be passed over without much notice. It is contrary to the contract of pledge, which does not pass any absolute interest, nor rest on any absolute condition. It is, as we have seen, repugnant to the ancient law, and it is contradicted by a late authority. *Comyns*,† who is of himself a great authority, says, that if a man pledge goods for money lent, he may redeem, though he does not come at the day; and the practice has since become familiar.

† 1 vol. 76. 81.

‡ Dig. tit. mort-
gage by pledge
of goods, b.

By the *lex commissoria*‡ at Rome, it was lawful for the creditor and debtor to agree, that if the debtor did not pay at the day, the pledge should become the absolute property of the creditor. But a law of *Constantine*, contained in the *code*, abolished this as oppressive, and with marks of indignation, declared that the memory of the former law ought to be abolished to all posterity. Such a rigorous decision as that in *Rolle*, is contrary to the law of France; of

§ Code, lib. 8. tit.
35. ch. 3. 3
Hub. 1038. sec.
17. 1 Domat.
362. sec. 11.

ALBANY.

Cortelyou

v.

Lansing.

of *Holland*, of *Scotland*, and, probably, of all other countries which have felt and obeyed the influence of the civil law ; and if it were really a part of the English code, in this instance also, we might say of these people, that they were truly "*toto divisos orbe*" by their laws, as well as by their situation.

* 1 Ld. *Raymond*, 434.
† 1 *Ves.* 278.

There remains only an extrajudicial dictum of C. J. *Treby*,* and another of lord *Hardwicke*,† and both supported only by the case in *Bulstrode*, which go to show that a pawn is not redeemable after the death of the pawnor, and these are all the authorities, as far as I have been able to discover, on which the whole proposition has rested.

In the chancery cases of *Tucker*, administrator, &c. v. *Wilson*, in 1714, and *Lockwood* v. *Ewer*, in 1742, and *Kemp* v. *Westbrook*, in 1749, it was said, that a pawnee of stock was not bound to bring a bill of foreclosure, and might sell without it. But in the two first cases, the stock had been, in the first instance, *absolutely transferred* to the mortgagee with a defeasance thereto, that the assignment should be void, or the stock retransferred on payment at the day. They were cases, therefore, not of a pledge but of a mortgage of goods, and although it is nowhere stated, in what manner the mortgagee is to sell, yet, in the first of these cases, there was a previous notice to the opposite party, according to the rule of the civil law, and the giving of this notice, was asserted to be the constant practice. The last case was strictly a pledge of chattels to secure a loan, without a specified time of payment ; and the assignee of the pawnor who had become a bankrupt, was allowed to redeem. This case has, therefore,

no further connexion with the present question, than to show that where no time is fixed, an assignee is competent to redeem.

The two cases of *Demondray v. Metcalf*, in 1715, and of *Vendeeze v. Willis*, in 1789, are cases of pledge, and perfectly in point in favour of the plaintiff. In the one case, there was a pawn of jewels, and in the other of bonds and securities. In both cases, the time of payment had elapsed, in the life of the pawnor; he died, and the executors, on a bill to redeem on payment of the debt and interest, obtained a decree accordingly. It is said, indeed, in the first case, that the executors could not have back the jewels, without the assistance of chancery.

If by this was meant the identical chattel pawned, it was, perhaps, correct; but if the observation meant that the executors had no remedy but in equity, it must be a mistake; for a court of law has complete jurisdiction over the subject, and is equally competent to grant relief where the right of property is not extinguished. It would be unreasonable to turn the plaintiff round to another forum, when there are no technical difficulties to impede, nor any defect of authority to give him redress *here*, by restoring to him, if not the specific thing, yet its equivalent.

If a court of law will permit the one party to demand his debt after the time, it will equally permit the other party to tender and redeem.† In the case of the *South Sea Company v. Duncomb*, K. B. 5 G. II. it was decided, that where the pawnor of stock did not pay at the day stipulated, the pawnee had his election to sue for the debt, or to stand to his remedy

ALBANY.

Cortelyou

v.

Lansing.

* *Prec in chan.*
4 & 2 Vern. 691.
698. 1 Eq. Ca.
Abr. 324 Gilb.
Eq. Rep. 104.
3 Bro. 21.

† *Str.* 919.

ALBANY.

Cortelyou

v.

Lansing.

against the pawn. The court did not state the remedy, but still there was to be a remedy under the sanction of law, and the only remedies hitherto suggested in the books, are the process by writ, as stated in *Glanville* ; the bill of foreclosure, as hinted in other cases, and the sale by the pawnee, after notice, in cases of the transfer of stock, as seems to have been the practice.

From this review of the cases, I conclude, that whatever right to redeem existed in the pawnor at his death, that right descended entire and unimpaired to his representative. There are two decisions fully to this effect, and there is not a decision to the contrary, or one which establishes, that if no time be limited to redeem a pawn, the right to redeem is extinguished by the pawnor's death.

The several *dicta* in the courts which go thus far, are founded on principles manifestly erroneous.— They departed from the true nature of a pawn, which was well understood in the Roman law, and well understood in the days of *Glanville* and *Bracton*, who were, no doubt, greatly instructed by that inestimable system of civil jurisprudence, although, with respect to *Glanville* in particular, he wrote the English law of his time, without much, if any, adoption from the Roman. The error consisted in applying to pawns the severe feudal doctrine of absolute forfeiture upon breach of a condition, whereas a pawn is in no respect an estate resting upon condition.

It would be a doctrine the most intolerable and oppressive. In one of the cases mentioned, a pawn worth 600*l.* was deposited to secure a loan of 200*l.* and if no time be mentioned, and the pawnee can

sell when he pleases, without first calling on the pawnor, or if the pawnor's right is gone by his sudden death, the law would establish a most disgusting speculation, infinitely more odious than the *lex commissoria*; for that was founded upon express agreement. And although the executor may not redeem, the pawnee has still his election to sue, and the executor has not even the privilege of the equitable rule, *qui sentit onus debet sentire commodum*.

It may be well enough to observe, by way of illustration, that except in cases of special agreement, the Roman law never allowed a pledge to be sold by the creditor, but upon notice to the debtor, and the allowance of a year's redemption.* And as this was not sufficiently observed, *Justinian* regulated the method of foreclosure by a particular ordinance, by which two years notice or two years after a judicial sentence was allowed to the debtor.†

It was moreover a well settled rule in that law, that the creditor could never hold the pledge by prescription; and that no length of time would preclude the debtor and his representatives from the right to redeem, and the reason given is very conclusive, because the creditor holds not as his own, but in another's right, "*alieno nomine possidet*."‡ I believe there is no country at present, unless it be England, that allows a pledge to be sold but in pursuance of a judicial sentence.§

The third point raised in this case is as to the necessity of payment or tender of the money loaned

§ *Huberus*, vol. 3. 1072. sec. 6. and *Perezius*, vol. 2. 63. sec. 8. as to *Holland and Brabant*. *Domas*. vol. 1. 362. sec. 9, 10. and 2 *Ersk.* 455, as to *France and Scotland*.

ALBANY.

Cortelyou
v.
Lansing.

* *Perezius on the Code*. vol. 2. 62. tit. 34. sec. 4. 5. do. p. 58. *Huberus*, vol. 1. p. 157. sec. 2. vol. 3. p. 172. sec. 6.

† *Inst. lib. 2. tit. 8. sec. 2. Dig. lib. 13. tit. 7. c. 4. Code, lib. 8. tit. 28. c. 4. and tit. 34. c. 1.*

‡ *Dig. lib. 41. tit. 3. c. 13. Code, lib. 4. tit. 24. c. 10. See also Perezius*, vol. 1. p. 267. sec. 12. 13. and 1 *Domat* 368. sec. 7. *Huberus*, vol. 3. p. 1077. sec. 11. See also *Halled's Gentoo Code*, p. 118, which allowed a redemption after the debtor's death.

ALBANY.

Cortelyou

v.

Lansing.

*Kington and
Preston, Doug.
691. 4 Durnf.
464, 5. 1 East,
208. 5 Viner,
24, in notis.
Turner q. Good-
win.*

previous to the commencement of the suit. The payment of the money and the return of the pledge were to be concurrent acts, to be performed by each party at the same time and place. Each must show a capacity and readiness to perform, and yet neither was to trust the other personally.—The one was not actually to part with his money, unless the other at the same time showed a capacity and readiness to return the pledge ; nor was the one to return the pledge until the other showed, at the same time, the like capacity and readiness to pay the money ; the acts being reciprocal, and one dependent upon the other.

But when one party has *incapacitated* himself to perform his part of the contract, there is no need of the other coming forward at the time to make a tender, or to show himself in a capacity to pay, because it would be a nugatory act which the law will never require.—If the one party *discharges* the other from a performance, by saying he will not perform on his part (and voluntarily and tortiously rendering himself unable to perform his part is equivalent to such discharge) it is well understood, that it is not necessary for the other party to go forward. This was so decided in the case of *Jones v. Barkley*,* and the same principle has been frequently advanced in other cases.—In the case of *Judah, &c. v. Kemp*, decided in this Court, October Term, 1801.—The suit was in trover for goods ; the plaintiff proved property and a demand and refusal ; the defendant was master of a vessel and had a lien on the goods for freight ; on demand he refused to deliver the goods, and said he had orders not to deliver them ; no tender of the freight, nor even a capacity to make one was shown ; the defendant did not object to deliver on that, but upon another ground. The only question raised was,

* *Doug. 684.
Rawson v.
Johnson, 1
East, 208.*

whether tender of the freight ought to have been made, and the Court decided that it was not necessary as the act would have been useless, and they gave judgment for the plaintiff.

ALBANY.

Cortelyou
v.
Lansing.

The last question is as to the rule of damages.— If the direction of the judge was correct, or if the rule is to be given by the court, then the verdict is to stand, and to be made conformable to such rule. But if the damages are to be considered as in any degree subject to the discretion of a jury, a new trial is to be awarded.

There is no doubt but that the measure of damages is sometimes a question of law, but more frequently it is to be left at large to the discretion of a jury. In cases where there is a criterion for an accurate computation, that criterion must be followed, and it becomes, then, a rule of law.

The value of the depreciation note is the measure of damages in the present case; and the only question is, how that value is to be ascertained. If it is to be ascertained from the face of the note? or from what time is that value to be computed? There must be some rule or principle on the subject, and that principle, whatever it may be, is a question of law, and not of an arbitrary *ad libitum* discretion in the jury. A great part of our common law jurisprudence is only a collection of principles, to be selected and applied to particular cases, by the discernment and diligence of the courts. I have no doubt the rule in the present case is a rule of law, and the only examination is, to discover it.

The direction at the trial was, the value of the certificate in 1799, when the plaintiff went to make a demand. This must not be understood to mean,

ALBANY.

Cortelyou

v.

Lansing.

that the cause of action arose then. From that ground the direction would have been erroneous. Putting out of view the previous sale, the plaintiff has not shown a cause of action by his act in 1799, for he ought at least to have shown, that he went with a readiness and a capacity to pay. The mental inability of the defendant, may have rendered him incapable of receiving an actual demand from the plaintiff, but it surely is not to be construed into a discharge to the plaintiff, from the performance of his duty, which was to come with a disposition and ability to perform his part of the contract ; that act of the plaintiff was, therefore, wholly immaterial as a ground of action, and if the value of the note is to be estimated from that date, it must be because the plaintiff manifested his will to have it then restored.

The value of the chattel, at the time of the conversion, is not, in all cases, the rule of damages in trover ; if the thing be of a determinate and fixed value, it may be the rule, but where there is an uncertainty, or fluctuation attending the value, and the chattel afterwards rises in value, the plaintiff can only be indemnified by giving him the price of it, at the time he calls upon the defendant to restore it, and one of the cases even carries the value down to the time of the trial.

* 3 Burr. 1363.
2 Black. Rep.
902. See also 6
Durnf. 696.

The cases of *Fisher v. Prince*,* and of the administrator of *Hunt v. Fuller*, have long since settled, that if the chattel after the conversion increased in value, or be attended with other circumstances, the damages may be enhanced accordingly. And in the case of *Shepherd, executor, &c. v. Johnson*,† the defendant was sued for breach of contract, in not re-

† 2 East, 211.

placing a certain quantity of stock by a given day, and the court held, as the direction had been to the jury, that the plaintiff was entitled to recover, not merely the value of the stock as it stood at the day, but the value as it stood at the time of the trial. And they said it was no answer to say, that the defendant might be prejudiced by the plaintiff's delay in bringing his action, for it was his own fault that he broke his engagement, and he might replace the stock at any time afterwards, so as to avail himself of a rising market ; I have no doubt it is just and right that the plaintiff in the present case, ought to recover the value of the note at the time he chose to demand it ; he has selected that time to call for his note and to liquidate its value, and no other measure of damages short of that, will indemnify him for the loss of the pledge ; I agree, therefore, on this ground to the direction that was given.

ALBANY.
 Vandenheuevel
 v
 United Insur.
 Company.

These were all the points that were stated in the case, or raised upon the argument ; and they being with the plaintiff, I take it for granted, he is entitled to judgment, and a new trial ought to be denied.

John Vandenheuevel *against* the United Insurance Company.

IN error on a judgment of the supreme court, in an action on a policy of insurance on the freight of " the good American ship called the *Astrea*, at and from *New-York*, to *Corunna*," the freight valued at ten thousand dollars, at a premium of fifteen per cent.

In an action on a policy of insurance, the sentence of a foreign court of admiralty, is not conclusive on the character of the property.

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ALBANY.
 Vandenheuvel
 v.
 United Insur.
 Company.

At the trial in the court below, the jury brought in a special verdict stating, among other things,

That the policy was underwritten by the defendants in error, in consequence of a written application made to them, by the plaintiff in error, in the words and figures following, to wit :

“ *New-York, 14th November, 1798.*

“ *Gentlemen—What will be the premium on the ship, freight and cargo of the Astrea, captain Price, consisting in mahogany, tobacco, staves, dye-wood and sugar, at and from New-York to Corunna, to sail in eight days, property of the undersigned.*

“ *I. C. VANDENHEUVEL.*”

That the ship in the course of her voyage, was captured by a British frigate, and carried into Gibraltar, where she, together with her cargo, were libelled in the court of vice-admiralty, and condemned as lawful prize to the captors, “ as belonging at the time of her capture to Spain, or to persons being subjects of the king of Spain, or inhabiting within the territories of the king of Spain, enemies of the king of Great-Britain.” That the freight, by reason of the capture and condemnation aforesaid, was totally lost to the plaintiff in error, who duly abandoned the same to the defendants in error, exhibiting to them at the same time, due proof of loss and interest ; that the freight was really the property of the plaintiff in error, and the ship and cargo were also his property, unless in judgment of law the plaintiff in error is concluded by the said sentence of condemnation ; that the ship, at the time of the capture, was registered as an American vessel, and had all the papers which an American vessel usually has ; that

the plaintiff in error was born a subject of the *United Netherlands*, and continued such until the 3d June, 1793, when he became a naturalized citizen of the *United States*, according to law ; and the defendants in error, at the time of underwriting the said policy of assurance, well knew that the plaintiff in error was born a Dutchman ; that the sum due to the plaintiff in error, supposing him to be by law entitled to recover a total loss, is 4,365 dollars 6 cents, and the sum due to the plaintiff in error, for return of premium, supposing him to be by law entitled to recover no more than a return of premium, is 700 dollars. After stating these facts, the verdict submitted the following questions to the decision of the court.

ALBANY.
Vandenheuevel
v.
United Insur.
Company.

1. Whether the plaintiff in error is by law entitled to recover the said sum of 4,365 dollars and 6 cents, being the amount of a total loss ?

2. If the plaintiff in error is not by law entitled to recover a total loss, whether he is by law entitled to recover the said sum of 700 dollars, being the amount of return of premium ?

3. If the plaintiff is not by law entitled to recover a return of premium, whether he is by law entitled to recover any sum whatever ?

On this verdict, the supreme court, after argument, decided, that the plaintiff in error was not entitled to recover as for a total loss, on the said policy of assurance, but that he was entitled to recover a return of premium, whereupon judgment was entered for the plaintiff in error, for the sum of 700 dollars.

ALBANY. In deciding on this case, **BENSON, KENT,** and **RADCLIFF,** justices, thus delivered their opinions.

Vandenheuevel **BENSON, J.** The principal inquiry in these causes is, respecting the effect of a *foreign* condemnation, the property in the goods condemned, being intended in the insurance of them as neutral; whether the condemnation is not conclusive against the assured? This question has heretofore come before us, but until the arguments which have taken place in the present cause, it does not appear to me to have been so fully examined as the difficulty and importance of it require.

A condemnation may be viewed, as consisting in its cause and in its principles, as to be discriminated from each other; and the principles may be divided into those which relate to the law, and those which relate to the fact, comprehending in the fact the proofs.

The distinction between the cause and the principles of a condemnation is exemplified in a case read on the argument from a late English reporter, 7 *Term Rep. Geyer v. Aguilar*, where one of the judges distinguishes between them as here intended; he expresses himself: "The ground on which the courts in France proceeded, was, that this was a capture of *enemy's property*, and it certainly is not contrary to the law of nations, to condemn a ship on that ground. Whether or not those courts arrived at that conclusion by proper means, I am not at liberty to inquire," &c. which is equally as if he had said, the cause of the condemnation, as declared by the courts in France, is, that the ship was enemy's property; and which is a sufficient cause of condemnation by

the law of nations; but what were the *principles* of the condemnation, namely, what were the proofs, or what was the fact as found by those courts from the proofs, or what was the law as adjudged by them to arise from the fact, I am not at liberty to inquire, &c.

ALBANY.
Vandenheuevel
v.
United Insur.
Company.

Insurances may be divided into general and special. A general insurance, is where the perils insured against, are such as the law would imply from the nature of the contract of a marine insurance considered in itself, and supposing none to be expressed in the policy. A special insurance is where, in addition to the implied perils, farther perils are expressed in the policy; and they may either be specified, or the insurance may be against *all* perils.

We have had an instance of each kind of these special insurances; of the latter, in the case of *Goix v. Knox*, "where, besides the usual risks enumerated in printed policies, it was declared, by a clause in *writing*, that the assurance was to be against *all* risks." And in the former, in the case of *Gardiner & others v. Smith*, "where the insurance was against the risks, among others, of *contraband and illicit trade*," and the goods were seized at *Jamaica*, while landing, and condemned as contraband and illicit by the law of that place; and cases may be supposed, where, although the property is insured as neutral, the insurer may, nevertheless, expressly take on himself the peril of condemnation, for breach of blockade, or for any other specified or enumerated cause; and in every such case, should there be a condemnation, the assured must be allowed to show, either by the condemnation itself, if it furnishes the requisite evidence, and if not, then by such matter extraneous

ALBANY.
 {
 Vandenneuvel
 v.
 United Insur.
 Company.

to it, as, under the circumstances of the case, may be admissible in evidence, that the condemnation was for some *one* of the causes specified in the policy; and so far, and to that intent, doubtless, the condemnation is examinable in the suit, by the assured against the insurer.

The cases at bar, are, as it respects the perils of condemnation, cases of general insurance, as here explained.

Where the property is insured as neutral, the law intends not only that the neutrality, as an ingredient or quality in the property or ownership of the goods then exists, but likewise that it shall be preserved during the continuance of the insurance, and consequently, that there shall not be any act or omission, either by the assured himself, or by others, whose acts or omissions may in that respect be deemed to affect him, to forfeit it; and the neutrality constitutes as it were, a *title*, the existence and preservation of which, either in himself, or in the other persons, if any, on whose account the insurance may be made, or for whose benefit it may, in consequence of a subsequent transfer of the goods, be to enure, the assurance is deemed to warrant; and this warranty, from the assured to the insurer, is a condition of the insurance, or the indemnity from the insurer to the assured.

Every condemnation is either *rightful* or *wrongful*—If the captured goods, being duly defended in the court of the captors, by alleging and proving the title of the assured as above defined, should, notwithstanding, be condemned, the condemnation will be *wrongful*. Every other condemnation is to be taken

as rightful, including a condemnation by default, no person appearing to defend the goods; and where the condemnation is wrongful, it must be attributed either to the error of the *judge*, as it relates to the law, or as it relates to the fact as deduced from the proofs; or error in the witnesses, as it relates to the proofs, in testifying differently from the truth; and whether the error, either of the judge or the witnesses be innocent or wilful, can never affect the question, whether the assured hath or hath not, a right to controvert the condemnation.

ALBANY.
 Vandenheuevel
 v.
 United Insur.
 Company.

If the assured has any such right, he must have it either limitedly, to controvert the principles which relate to the law, and not those which relate to the fact; or those which relate to the fact, and not those which relate to the law; and if to controvert those which relate to the fact, still he is to be *confined* to the proofs as they were before the judge, by whom the condemnation was pronounced; or he must have the right *unlimitedly*, or, as it is expressed in the case of *Hughes v. Cornelius*, 2 *Show.* 232, to controvert the condemnation "*at large*."

It will readily be perceived, that as the principal question, whether the assured is or is not to be concluded by the condemnation may be differently decided; so will the situation of the insurer be varied from certainty of safety, to the mere expectation or possibility of it. If the condemnation is to be conclusive against the assured, then, however, there may have happened a "capture, a *taking at sea*," and so the case within the very terms of the policy; yet if, further, there has been a condemnation of the goods, the insurer is safe in an absolute sense; but

ALBANY.
 Vandenheuvel
 v.
 United Insur.
 Company.

if the assured may controvert the condemnation, the safety of the insurer then becomes uncertain of course ; in like manner, though in less degree, may the situation of the insured be varied, as the several questions respecting the limitations of the right of the assured to controvert the condemnation, may also be differently decided.

In some cases it may be more favourable for the insurer, that the assured should controvert the law and not the fact. In others, again, that he should controvert the fact and not the law ; and it must ever be most favourable to the insurer, that the assured should be precluded from producing *new* proofs ; and this difference of situation must be viewed as material, in the *greater* number of cases, which probably will happen ; not only so, but some may easily be conceived, where, as it respects the certainty, or possibility, that the assured can, or cannot, succeed in showing the condemnation to be wrongful may wholly depend on a different decision, one way or the other, of these questions, taken singly ; before, therefore, it can be declared that the right of the assured to controvert the condemnation is limited, the rule whereby *some* of the limitations of it here suggested, are to be adopted, and others to be rejected *ought to be shown*. It may, however, be safely asserted, no such rule exists ; the limitations themselves, the distinctions that where a judgment is alleged, the party against whom it is alleged, may controvert it as to the law, but not as to fact ; or as to the fact, but not as to the law ; and if as to the fact, that he is still to be concluded as to the proof, not being known in the law ; and I cannot discern them, as

to be inferred from any thing peculiar in the contract of insurance ; so that the right of the assured to controvert the condemnation not being susceptible of limitation, if, therefore, he has the right, he must have it unlimitedly, to controvert the condemnation *at large*.

ALBANY.
 Vandenheuevel
 v.
 United Insur.
 Company.

It is now to be stated, that where the property is insured as enemy's property and a capture by an enemy, the other belligerent party, it is inevitable that the goods will be both actually and rightfully condemned; they are as much lost to the assured as if they were captured by a pirate, and can no otherwise ever happen to be recovered to him than by a recapture ; and he may, in such case, abandon instantly on the capture. But where the property is insured as neutral, there are means, which, as to be distinguished from the forcible or physical means of recapture, may be denominated *moral means*, whereby, until a condemnation shall have taken place, it is *possible* the goods may be recovered : there may be a claim and defence of them in the court of the captor ; and although it is stated as *possible* only that the goods may, by a defence of them, be recovered ; yet, if it was requisite to the argument, it might be stated as the intendment of law that it is *probable* ; for if the title of the assured should be duly alleged and proved, and the goods should, notwithstanding, be condemned, the condemnation, as has been already stated, must then be to be attributed to the error, either of the judge or the witnesses, and the law will never presume error *beforehand*. If, however, there is a *possibility* only, that, by a defence of the goods, a

F f

ALBANY.
 {
 Vandenhoevel
 v.
 United Insur.
 Company.

condemnation of them may be prevented, it is sufficient to make it the duty, either of the assured or the insurer, to defend them, or to bear the loss, if they should be condemned undefended; but it will be perceived the law can never impose it on the insurer to defend them.

Where lands are granted with warranty, if the grantee is sued by a person, claiming by better title than the title of the grantor, he may, as it were, abandon to the grantor; he can compel him to appear in court, and defend the land; he may *vouch* him, and thereby substitute him as the defendant to abide the event of the suit "*for loss or gain*;" and he is the party to be presumed best cognisant of the title. Such is the rule in the case of a warranty, in the nature of a general contract of indemnity, from grantor to grantee; but if the assured may abandon to the insurer on the capture, and impose the defence of the goods on him, the rule will be reversed; the warrantor may then substitute the warranted, as the defendant, and the defence of the title will then be imposed on the party to be presumed not only least *cognisant* but even wholly *ignorant* of it.

The warranty in a grant of land being an indemnity against the acts of others claiming by title, and consequently not against entries by persons not so claiming, nor against assumptions of the land by the public authority of the state, nor as to any matter which may have come to exist thereafter; it may be said to be an indemnity against title only, and not against casualty; and, accordingly, if there should be a judgment against the title of the grantor, whether rightful or wrongful, he is alike held to indem-

nify the grantee for the loss of the land ; but where the property is insured as neutral, the warranty of the title, so far from being by the insurer to the assured, being by the assured to the insurer, the insurance can be a warranty or an indemnity, not against title, but against casualty only, against tortious acts of private persons, and so unauthorised by law, or the acts of the state, such as reprisals, embargoes and impressments, the acts, in neither case, however, proceeding on a supposed total absence, or a defect, or forfeiture of the title, as warranted by the assured ; another consequence, therefore, of a supposed right in the assured, to abandon, on the capture, and impose the defence of the goods on the insurer, will be, that the insurance will thereby be essentially changed from being an indemnity against casualty only, to be likewise an indemnity against title, and against a want of that very title, which, as has been stated, the assured warranted to be existing, and that it should be preserved.

Farther— If the assured may abandon on the capture, he is entitled then, also, to sue for the loss, and the insurer must, accordingly, litigate the suit, in expectation it may be in his power to prove either that the property was not neutral, or that the neutrality had been forfeited, and so a breach of the warranty, and involving as a consequence, that the goods may be rightfully condemned ; or he must pay the loss *voluntarily*, and also *instantly*, any credit allowed in the policy, being wholly of special or positive compact or regulation, and not arising from the insurance considered in itself. If he litigates the suit on the policy, he must relinquish a defence

ALBANY.
Vandenheuevel
v.
United Insur.
Company.

ALBANY.
Vandenheuvel
v.
United Insur.
Company.

of the goods in the court of the captor, or expose himself to the palpable incongruity of insisting in the suit by the assured, that the goods may be rightfully condemned, and of insisting, at the same time, in the suit by the captor, that they are neutral property ; that the neutrality has been preserved, and therefore, that they cannot be rightfully condemned ; on the other hand, if he voluntarily pays the loss, he then precludes himself from afterwards alleging a breach of warranty ; for, although I forbear from an opinion, whether the insurer can or cannot recover back the money paid for a loss, as having paid it, not knowing at the time, certain facts, which, if he had known, he might thereby have discharged himself from the insurance ; yet, I have no difficulty in declaring, that the facts must be such as it may be supposed he could not be so apprised of them, as to be put on an inquiry, or to be on his guard respecting them, which, however, can never be said to be the case, where goods being insured as neutral, are captured by a belligerent, it being to be intended, as will be more particularly stated hereafter, that they were captured, as charged to be enemy's property, although insured in the name of a neutral ; and, therefore, if the assured will, notwithstanding, voluntarily pay the loss, he will then be deemed forever to have waived or renounced his right to allege the breach of warranty ; and the case will be within the general rule, that if a party shall omit to allege a fact, existing at the time, and whereby he might have defended himself against a recovery, he shall not, as against the other party in the suit, be allowed to avail himself of it thereafter, and which was recognised in the court of errors, in the case of *Le*

Guen, appellant, v. *Gouverneur* and *Kemble*, respondents ; where the appellant having placed goods in the hands of the respondents, as his agents, to be sold, and having himself made a contract for the sale of them to *Gomez & Co.* but leaving the sale still to be perfected by the respondents, the notes given in payment, were, accordingly, to them in their *own* names, and the vendees having, before the notes became payable, proceeded to *France* with the goods ; “ He demanded from the respondents an authorisation, to receive there, whatever sum should remain of the proceeds of the goods, so sold on his account, to the above vendees, after first deducting and reserving at their disposal, such sum as should be completely sufficient to cover them, for the general balance of their account ;” and they refusing to give him the authorisation, he brought a suit against them in this court for the refusal, as for a breach of orders, whereby they had become instantly liable for the value of the *whole* of the sale, and on a special verdict he had judgment, and to the amount so claimed by him.—The respondents thereupon filed their bill in the court of chancery, to the effect of a suit at law, to *recover back* a payment, to enjoin him from proceeding on the judgment, “ suggesting, that subsequent thereto, on the trial in the suit which they had brought on the notes against the vendees, a verdict had been found for the defendants, on the sole ground of a fraud having been practised by the appellant in the sale of the goods,” by affirming or warranting them to be of a better kind or quality than they were, “ and the chancellor ordered an issue at law to try the fraud. A question, however, was reserved by the counsel of both parties, to be determined as a preliminary

ALBANY.
 Vandenheuevel
 v.
 United Insur.
 Company.

ALBANY.
 Vandenheuvel
 v.
 United Insur.
 Company.

to the trial, whether the respondents were not precluded by the antecedent circumstances, from insisting upon the alleged fraud as a ground of relief? The chancellor decreed they were not so precluded, and confirmed the order for the trial, and on the appeal, the decree was reversed, and the respondents' bill in the court of chancery was ordered to be dismissed." If, therefore, the assured may abandon on the capture, and as the insurer must accept the abandonment, and pay the loss, then, although it might afterwards be proved *undeniably* in the court of the captor, that the property was not neutral, the insurer would, notwithstanding, be without any means of restitution.

These considerations are sufficient to show that the assured cannot abandon on the capture ; that it is necessary the goods should be defended in the court of the captor ; that the defence of them remains on him ; and that he cannot cast it on the insurer. It is, however, at the same time to be stated, that if, having made a defence in the court of the captor, the assured may still afterwards controvert the condemnation *at large* in the suit on the policy, it is obvious such previous defence can be estimated as a mere formality only ; that nothing is gained by it to the insurer, but that he is left in the like disadvantageous situation as if he, and not the assured, had to defend the goods in the court of the captor ; for although in the suit on the policy, instead of *defending* he will have to *defeat* the title of the assured, still the one case, equally as the other, involves the truth or falsehood of the *same* facts ; so that the reasoning, from what has been stated, terminates in this conclusion, that the *right* of the assured to contro-

vert the condemnation, if it does exist, can exist no otherwise than to controvert it *at large*; that it is his duty to defend the goods against a condemnation in the court of the captor, and that the right and the duty being incompatible, the right must be declared not possible to exist. Lest, however, the reasoning, as it may respect the question, whether the assured can or cannot abandon instantly on the capture, may be considered as inconclusive and unsatisfactory, unless it be shown when he can abandon, it may be requisite still briefly to state, that besides the case of a capture by an enemy, the opposite belligerent party, where the goods are insured as enemy's property, and a capture by a pirate, there is another case where the assured may abandon on the capture: The case of a capture by way of reprisal, and which, indeed, is in the nature of a capture by an enemy, but that every other capture being necessarily by a friend, in relation to the captured, must be intended to be that the goods are to be carried into a port of the captor, for a regular and authorised examination or adjudication, whether they are or not lawful prize, either as being *covertly enemy-property*; or if neutral, that the neutrality has become forfeited, and the assured being held to follow the goods and defend them, and the condemnation being conclusive against him, should they be condemned, it results that he can abandon only in the event of their being restored to him, and the voyage, in consequence of the capture and detention, *broken up*; and if the insurer shall, thereupon pay the loss, then, whatever right or remedy there may be against the captor, will enure to his benefit.

ALBANY.

Vandenheuevel
v.
United Insur.
Company.

ALBANY.
 Vandenheuvel
 v.
 United Insur.
 Company.

The practice in *France* has been urged as a precedent, and *Emerigon* has been read on the argument, to show what is there received as law on the subject.

“The act of the prince is put in the class of casualties (*La classe des cas fortuits*) and such also is the case (*Il en est de meme du fait*) as to the unjust sentence of a magistrate; and it is of no importance whether the injustice proceeds from the corruption of the judge or his ignorance; so that it is then certain, that the insurers shall answer for an unjust condemnation pronounced by the tribunal of the place into which the captured ship shall be carried, judgments rendered by foreign tribunals being of no weight in *France* against Frenchmen, the cause being to be decided anew; whence it follows, that a judgment of condemnation pronounced by an enemy-tribunal, is no proof that there hath been a concealment of the *real person for whose account* the insurance was made (*que le veritable pour compte ait etc cache*) nor any title (*un titre*) which the insurer may allege to avoid paying the loss. Such is our jurisprudence.”—*Emerigon*, c. 12. sec. 20.

The last sentence may be expressed in other words—“such is our interpretation of the contract between the assured and insurer, as to the right of the assured to controvert a foreign condemnation, the property being insured as neutral.” The argument, as contained in what is here cited, is, that an insurance being an indemnity against casualty, and an unjust foreign condemnation being a casualty, an insurance is therefore an indemnity against an unjust foreign condemnation; and the act of the prince being a casualty, the proof of the minor term in the syllo-

gism consists in an assertion, that the act or unjust sentence of a magistrate, is to be classed equally with the act of a prince among casualties ; whereas it is difficult to conceive two acts less of the same class or nature, and especially as it respects assured and insurer, than the act of a prince in the exercise of mere sovereignty, arresting goods either for permanent appropriation, or for temporary use, or detention only, and the act of the magistrate in function as a judge between captor and captured, condemning the goods as forfeited to the captors. The act of the prince is arbitrary, and can be justified only from necessity, for reasons of state, and may consist with an admission of a perfect title to the goods in the captured, the person from whom they may be taken ; whereas the act of the magistrate is judicial, and if right, can be only so, as warranted by the law of property, and is in denial of the title of the captured. In case of an arrest by a prince, the right of action of the assured accrues by the arrest, and, therefore, whether it can be justified or not, is never brought into question ; but where there is a condemnation by a magistrate, the right of action does not accrue by the condemnation itself, it can only be conceived to accrue by the supposed injustice of it. If the arrest, the act of the prince, is of that class of acts for which the insurer is to answer ; then it is immaterial whether it is a foreign or domestic arrest, if the term " domestic " may, for the sake of brevity, be used and applied to an arrest by a prince, and a condemnation by a magistrate, to distinguish it as having happened in the same, and

G g

ALBANY.

 Vandenhoevel
 v.
 United Insur.
 Company.

ALBANY.
 Vandenheuevel
 v.
 United Insur.
 Company.

not in a different nation from that where the assured shall have sued on the policy, the insurer is equally to answer for the one as the other ; but as it relates to a condemnation, the distinction between foreign and domestic is essential ; the right, as contended for, being to controvert a foreign condemnation only ; and, consequently, a domestic condemnation is always to be received as conclusive against the assured ; hence it is evident, that if an unjust sentence of a magistrate is a casualty for which the insurer is to answer, it cannot be so as being of the same class with the act of the prince : or that if it should be admitted to be a casualty, as being so of the same class, or *like* an act of the prince, then, as the insurer is equally to answer for the arrest, whether it is domestic or foreign, so ought he, in like manner, to answer for the condemnation, whether it is domestic or foreign ; and, therefore, that as far as the argument for the right of the assured to controvert a condemnation, depends on a supposed *similitude* between an unjust condemnation by a magistrate, and an arrest by a prince, and so far as it also depends at the same time on the distinction between a foreign and domestic condemnation, and that the right is only to controvert the former but not the latter, it is at variance with, and, consequently, defeats itself.

Emerigon, in farther support of the assertion—“ that an unjust condemnation is a casualty, for which the insurer is to answer,” refers to *Roccus*, Not. 54. “ *Mercēs captæ a potestate, seu iudice justitiā administrante in illo loco, aut a populo, aut ab aliqua quacunque persona per vim, absque pretii solutione, tenenter assecuratores solvere æstimatio-*

nem dominis mercium, facta prius per dominos mercium cessione ad beneficium assecuratorum pro recuperandis illis mercibus, vel pretio ipsorum a capientibus, ut probat *Stracc* : De Assecurat : Gloss : 20. et sequitur *Joan* : de *Evia* in Labyrinth : Commer. naval : lib. 3. c. 14. numb. 27 ; et melius fundatur ex dictis a *Santer* : De Assecurat : pars 4. num. 20. ubi adducit casum de injustitia facta, ab aliquo iudice ex quo merces amittantur vel damnum aliquod sentiant, an comprehendatur sub promissione *casus fortuiti* et assecurator teneatur ? Adducit *Bart* : in L : exceptione col : penult : in fin : ff : de fidejusso ; ubi illud, quod iudex facta injuste, quoad partes, dicitur *casus fortuitus*, et pertinet ad emptorem rei, et sic videtur in assecuratione quod pertinet ad illum qui in se suscepit *casum fortuitum*." I do not possess the authors here referred to by *Emerigon*, but I find the last, *Bartolus*, referred to by *Perezius*, as a writer on the civil law. Recourse, therefore, must be had to that law to discover the evictions of the things sold (the condemnation intended by him as casualties, (*casus fortuiti*) and so belonging to the buyer *qui pertinent ad emptorem*) to bear the loss himself, to be as distinguished from those for which the seller is to answer, in order thereby farther to discover, whether in a suit judicially heard and determined between captor and captured, a condemnation of the goods as a prize to the captors for want of title in the captured, and alleged to be wrongful, is an eviction of the captured, the assured, for which the insurer is to answer ? " Tenetur de evictione venditor— Porro evicta re datur emptori actio adversum venditorem—Est ex empto actio, quæ inest natura con-

ALBANY.

 Vandenheuevel
 v.
 United Insur.
 Company.

ALBANY.
 Vandenheuvel
 v.
 United Insur.
 Company.

tractus—Cessat evictionis præstatio ob culpam emptoris—Culpam committet emptor, neque de evictione agere potest, si, cum posset venditori denunciare, non denunciaverit motam controversiam, utque judicio adesset et rem defenderet, nam venditori poterat fuisse justa defensionis causa utpote *scienti melius rei a se venditæ jus et conditionem*—Ac sic in causa evectiois sententia lata contra emptorem ei sit *regressus* contra venditorem si *vocatus* ab emptore venditor in judicio comparuerit ad *rei* defensionem eam que suscepit, quia nihil est quod imputetur emptori, qui, ut requiritur, denunciavit venditori motam litem, cui, quod eam defendere non potuerit, imputandum erit.” *Perezii Prælect: in lib. 8. cod. tit. 45. de evictioneb.* From these passages, it is evident, that the evictions, intended by *Bartolus* to be deemed *casualties*, and so the loss by them to be borne by the buyer, must be of a different class or kind from an eviction for the want of title in the seller, he having been vouched to appear and defend his title (*vocatus ut in judicio compareat ad rei defensionem*) and the civil law, as to the warranty from the seller to the buyer, in respect to the eviction, or other act whereby the buyer may lose the thing sold, when the loss is to be borne by the buyer, and when the seller is to answer for it, being the same with our own law, it is not necessary, as an answer to the argument, from the supposed analogy between the case of seller and buyer, and the case of assured and insurer, to add to what has already been stated in comparing or contrasting a warranty in a grant of lands, with an insurance, the property being insured as neutral; and it only remains to be re-

marked on *Emerigon*, considered as an *authority*, that *Roccus* himself, on whom he relies, does not, by the act of the judge in taking the goods, and for which the insurer is to answer, intend a judicial act or procedure between captor and captured in a case of taking or capturing goods as lawful prize ; the taking, as he describes it, being within the territory where the judge has jurisdiction, (*captæ judice justitiam administrante in illo loco*) but a taking as a prize, it is to be supposed, would have been mentioned by him as taken at sea. That the injustice of the taking consists in its being without paying for the goods, (*absque solutione pretii*) necessarily importing that the captured, the person from whom they were taken, was entitled to be paid for them, and which again necessarily affirms his title to them ; but when the goods are taken from the captured, and adjudged to the captors, the injustice, if any, as it respects the act of the judge, consists in an error in him in disaffirming any title in the captured, but not in his awarding the goods to the captors without any recompence to the captured. The official act, therefore, of the magistrate, in taking the goods intended by *Roccus*, can be no other than an act in the nature of an impress, and for which the insurer is unquestionably to answer ; and that to suppose an unjust sentence a casualty, so as that the insurer is to answer for it, is altogether fallacious ; casualty being applicable only to a fact possible, that it will or will not happen, until it either shall have happened, or, by the intervening happening of some other fact, shall have become impossible ever to happen ; in each case, however, it equally ceases to be casual,

ALBANY.
 Vandenheuvel
 v.
 United Insur.
 Company.

ALBANY.
 Vandenheuevel
 v.
 United Insur.
 Company.

and becomes certain, in the one that it has happened, and in the other that it cannot ever happen ; but that casualty is not applicable to the sentence of a judge on the question, whether it is just or unjust, or to any other mere opinion, whether it is right or wrong, declared on any subject. For although it may be afterwards demonstrated that the opinion is right, or that it is wrong, yet it never can become either certainly right or certainly wrong, as having before been casual, whether it would be right or whether it would be wrong. It is true that the law has ordained that every judgment, until reversed, shall be taken to be certainly right ; if it should be reversed, it is then to be taken as certainly wrong, and the judgment of reversal is to be taken as certainly right. If the judgment of reversal should be reversed, the first judgment being thereby affirmed, is again to be taken as certainly right, and the judgment of reversal as certainly wrong ; but this legal or artificial certainty is in no manner the same with that certainty existing in nature, and having as its opposite, casualty. Certainty, as opposed to casualty, is to be proved as a fact, to have either physically happened, or become impossible to happen, and not to be demonstrated as a proposition, either morally right or morally wrong. The opinion whether a sentence is just or unjust, may be ambulatory forever. Thus it is manifest, that the practice in *France* is erroneous ; and there is reason to suppose it to have proceeded from a misapprehension of the very authorities cited to prove it warranted by law or principle. It, however, having obtained, and being established in fact, in the nature of a custom, or usage, it ought, per-

haps, not to be changed there ; for both parties being apprised of it, they can make their calculations, as to the risk and premium, accordingly, and in that view of it, no injury will be produced by it ; but it certainly can have no influence on the present inquiry, which is, as to the *true interpretation* of the contract, according to *universal* law, independent of any positive local practice whatever.

I will now briefly apply to the case of an insurance, the law, as declared in the case of *Hughes v. Cornelius*, already cited, it being the most ancient case in the books, as to the effect of a foreign condemnation ; and the adjudication which took place in it, having never been questioned, the case is now to be viewed as of the highest authority.

The judges, in that case, not only assume it, that a domestic condemnation is to be received as conclusive, but they suppose that, therefore, a foreign condemnation ought likewise to be so received ; they argue the conclusiveness of the latter, from the conclusiveness of the former ; they express themselves, “ as we are to take notice of a sentence in the admiralty *here*, so ought we of those *abroad* in other nations, and we must not set them *at large* again.” It is true, the question was only as to the *direct*, and not as to the *collateral* effect of a condemnation ; but the reasoning with which the judges close their opinion, that a foreign condemnation is to be conclusive, as to the direct effect of it, namely, “ that if the captured is aggrieved, he must apply himself to the king and council, it being a matter of *government*, he will recommend it to his liege’s ambassadors, if he see cause, and if not remedied, he may grant

ALBANY.
Vandenheuvel
v.
United Insur.
Company.

ALBANY.
 Vandenheuevel
 v.
 United Insur.
 Company.

letters of mart and reprisal," will equally apply, that it is to be conclusive as to the effect of it on an insurance ; and not only contains a sufficient answer to the objections, to receiving it as conclusive, as to such effect of it, but obviously supposes, that as to the several effects of a condemnation in respect to the conclusiveness of it, there is no difference between them.

The objections to receiving a foreign condemnation as conclusive against the assured, if I have rightly understood them, and, indeed, as some of them are expressed by a late English writer, on the law of insurance, *Park*, 363, also read on the argument, are, " that the judges of a foreign nation may possibly decide on their own municipal laws or ordinances, contravening, or not forming a part of the law of nations ;" and further, that the judge of a belligerent nation cannot be viewed as standing indifferent between a neutral nation and his own, in deciding on the interfering rights of neutrals and belligerents, as depending on, or to be deduced from, the *law of nations*.

That even the most enlightened and upright judges may oftentimes, and in a great degree be under the influence of *national* partiality, can scarcely be denied ; such is human nature, "*Parum cavet natura*." But can neutral nations say they are less susceptible of interest or passion, than belligerent nations ? Is not the armed neutrality in Europe, in 1780, to compel the *British* to acknowledge and observe it as a principle of the law of nations, that free ships make free goods, a proof of directly the reverse ? Can our nation claim us, or can we claim ourselves, to

be more free than the judges of belligerent nations, from national partialities? If the assured is warranted in surmising a partiality in the belligerent judge, is not the insurer equally warranted in surmising it in us, and, consequently, will not justice between them as to the question, and according to its just and equal merits, whether the principles of the condemnation, as they relate to the law of nations, are right or wrong, be alike to be suspected as fallible, when declared by us, as when declared by the judges of the belligerent nations? But a sufficient, and, perhaps, the most proper answer, to the whole of the objection, is furnished in substance, by the judges in the opinion above cited, from the case of *Hughes v. Cornelius*, that if a judge of one nation, in a case of a capture at sea, will assume novel and false principles, as principles of the law of nations, or misapply, or unduly extend, or restrict such as may have been already received and sanctioned, or misinterpret a treaty, or decide wholly on the particular regulations of his own nation, repugnant to, or deviating from the law of nations, or by whatever other erroneous reasonings or means, considered as the principles relative to the law in the case, he shall come to it as legal conclusion, that the goods captured, ought to be condemned as prize, either as being enemy-property, or for breach of blockade, or as being contraband of war, or for any other cause whatever, every such condemnation would be a grievance on the captured, against which his nation is to claim and procure reparation for him. It would be perfectly a *casus fœderis*, a case where the nation, in virtue of the mutual obligation

ALBANY.
 Vandenheuvel
 V.
 United Insur.
 Company.

ALBANY.
 Vandenbeuvel
 v.
 United Insur.
 Company.

of allegiance and protection, between sovereign and subject, would be held to interfere and remonstrate against the principles of the condemnation, and insist that they be disavowed or renounced, and that reparation be made to the captured ; who, instead of seeking for indemnity from an underwriter, through the medium of a court of justice, must seek for it from the foreign nation itself, through the medium of the government or sovereignty of his own nation.

I conclude, with remarking, that possibly, as I have already intimated, an insurer may, by especial or express insurance, take on himself the peril of an unjust condemnation ; and something of that kind has been attempted, by inserting a clause in the policy to the following effect : " Warranted American property, and proof thereof to be made, if required, in *New-York* only ;" but whether an insurance in this form, is sufficiently provisional or explicit ?— Whether it would be deemed to be against a condemnation for *any* cause, or against a condemnation for *some* causes only, and not *others* ; and if so, which the causes are, as to be discriminated from each other ? And especially, whether the assured may abandon on the capture, or whether he is not bound to follow the goods into the court of the captor, and there defend them ? Or, in short, whether it is possible to devise a form, fully and distinctly providing for all the cases and events which may occur ? Or, whether it is not unavoidable, that the whole must be put on the simple footing of a *war-premium*, and a *war-risk* ; so that all understanding, representation, or warranty, that the property is neutral, and that the neutrality is to be preserved, and not forfeited, are to be altogether laid out of the

contract between the parties? are questions which I suggest, as probable to arise, but on which it is not necessary that I should express an opinion in deciding the case at bar, it being a case of general insurance, and where, for the reasons I have assigned, my opinion is, that a foreign, equally as a domestic condemnation, is to be received as conclusive against the assured.

RADCLIFF, J. This was an insurance on the freight of the *Astrea*, from New-York to Corunna in Spain. The policy was subscribed by the defendants on the 19th November, 1798, in consequence of a written representation from the plaintiff, stating the ship, freight and cargo *to be his property*.

The plaintiff was originally a subject of the United Netherlands and continued so till the 3d January, 1793, when he was naturalized as a citizen of the United States. He must, of course, have emigrated to America at least two years antecedent to that period and before the United Netherlands were involved in the late European war, and he is stated to have been personally known to the defendants.

The vessel during the voyage was captured by a British frigate as *prize*, carried to Gibraltar, and with her cargo, there condemned by the court of vice-admiralty, on the ground of her "belonging at the time of her capture to *Spain*, or to persons being subjects of the king of *Spain*, or inhabiting the territories of the king of *Spain*, enemies of *Great-Britain*." From the situation of the plaintiffs, and the representation to the defendants, the insurance must be considered as made upon *American* or *neutral property*. The representation is to this purpose equivalent to a warranty of that fact, and liable to the

ALBANY.
Vandenheuvel
v.
United Insur.
Company.

ALBANY.
 Vandenheuevel
 v.
 United Insur.
 Company.

same result. In my view of the subject two questions arise.

1st. Whether, upon the *terms of the contract*, the plaintiff is entitled to recover?

2d. Whether, in respect to the *fact of neutrality*, he is *concluded* by the foreign sentence?

If upon the contract he would be entitled to recover, and is not concluded by the sentence, it is conceded or offered to be proven that the property was in reality neutral, or such as was so represented to the defendants.

The second question has already been twice determined in this court; first, in the case of *Ludlow* and *Dale*,* in which I gave no opinion, it being argued before I took my seat; and secondly, in the case of *Goix* and *Low*.† In the last, although the subject in some respects presented itself to my mind in a different light, I was content to acquiesce in the opinion which had been previously delivered, considering the rule to have been definitively settled as far as depended on this court. The magnitude of the question has induced us to review it in this and other causes, but notwithstanding the able and zealous discussion it has received, I can perceive no new lights on which to change my opinion.

It may be premised that in the course of the argument much was said of the policy of the *English* courts in deciding this question in favour of the insurer; and the policy of our adopting a different rule. On a careful examination of the *English* decisions, I cannot discover any ground for this suggestion. They appear to rest on principles unconnected with any motive of policy, and are indiscriminately applied to their domestic as well as to foreign tribunals.

* *January*
 Term, 1799.

† *April Term*,
 1800.

If the consideration were proper in determining a rule for ourselves, I am unable to perceive its force or application.

ALBANY.
 Vandenheuevel
 v.
 United Insur.
 Company.

In every instance of a foreign condemnation a loss must necessarily happen. If the property be really American, and insured here, the burthen must fall on some of our citizens. It is then a question between them solely, and it can never be politic or just to seek to shift the loss from one description of citizens to another. If the property be not American, and insured in this country, an interested policy, if such could be justified, would dictate an opposite rule of decision, and lead to protect the American insurer against the foreign owner, and thus determine the question against the insured.

Again, if the property be American, and insured abroad, the remedy is placed beyond the reach of our laws, and it would be a vain presumption in the courts of this or any other country to attempt to prescribe a rule for foreign tribunals. But I dismiss this topic as unconnected with the merits of the question. Opinions founded on policy are necessarily various and fluctuating, and ought never to actuate a court of justice. The question in every instance must depend on its intrinsic merits arising from the nature of the contract and the general law of insurance, unless restrained by positive regulations.

In this view of the subject, the judicial determinations of courts in different countries, as well as the opinions of individuals, may differ, but that difference, I apprehend, can never, as has been imagined, become a matter of *national* concern. The regular administration of justice, when conducted with good

ALBANY.
 Vandenheuvel
 v.
 United Insur.
 Company.

faith, can never implicate the government with respect to foreign nations ; and whatever rule may be established on this occasion, it can only be considered, as affecting the rights of our own citizens ; as existing between them solely. If foreigners should at all be interested, it must happen in consequence of their voluntary act to seek insurance here, and they cannot complain of the conduct of our courts, if they receive the same measure of justice which is administered to others. I therefore equally lay out of view every argument derived from this source.

It is true there may be cases to interest the *government* in behalf of its citizens. When losses are sustained by the unjust sentences of foreign tribunals, there is no doubt but the party injured is entitled to apply to *his government* for redress, and that government, in case of *palpable injustice*, has a right to demand and enforce reparation from the sovereign of the aggressor—it is even bound to do so, or in its discretion to grant reprisals, or an indemnity to the injured party. It then and not till then becomes a question of *national concern*. As such, the delicacy and importance attached to it, as to all national questions, would require the government to proceed with caution, and in doubtful cases rather to presume that justice has been done than to impeach the integrity of foreign courts. Thus it is held that it ought not to interfere but in cases of violent injuries, countenanced and supported by the *sovereign* of the aggressor, and where justice is absolutely denied *in re minime dubia* by all the tribunals and in the last resort.* This is the language of the most approved writers on public law, and is professed to be the practice of all civilized nations, and one† of those

* *Gro. de Jure, Ec. lib. 3. c. 2. sec. 4, 5. 1 Coll. Jur. 102, 3. Vatt. 257, 8.*
 † *Vatt. The report on the Prussian memorial.*

writers, perhaps the most eminent and correct, exemplifies the maxim by referring to the principles maintained by the *British* government on a similar occasion. Hence it will be admitted, as a general rule, that every government is bound to respect the judicial decisions of foreign courts, and in the first instance to consider them as just and of course generally conclusive. But these reasons for the rule are strictly applicable to the government alone when acting in behalf of its citizens. They cannot apply to the conduct of our courts in the ordinary administration of justice. We actually see that the courts of *France* and *England* differ on the very question before us, and it has never been deemed a subject of *national* complaint by either.—I therefore think that it is not on the ground of *national* interference or courtesy that such sentences in our courts are held to be conclusive; their conclusive quality depends on other principles.

1st. As between the insurer and insured, in case of a representation or warranty of neutral property, I think a condemnation in a foreign court of admiralty, when founded on the want of neutrality, operates definitively against the insured according to the terms and effect of the contract itself. During the existence of a maritime war, the state of commerce is necessarily more or less precarious. Neutrals are not exempt from this inconvenience, but neutrality, if respected, affords a great advantage. The neutral merchant, when he effects an insurance, may either retain the benefit of his neutrality, or, if diffident of its security, he may relinquish it, and specially insure his property against every possible loss. If he

ALBANY.
 Vandenheuevel
 v.
 United Insur.
 Company.

ALBANY.
Vandenheuvel
v.
United Insur.
Company.

insure the property as neutral he thereby signifies his intention to avail himself of his neutrality, and of course will pay a less premium ; but in doing this it must follow that he takes upon himself the risk of that neutrality. He thus far *divides the risk*, and is to be considered his own insurer. He cannot, by paying a less premium, enjoy the benefit of his neutrality and at the same time the benefit of an insurance for the want of it.

It is obvious that every such representation or warranty is made, not with a view to an examination of the fact in our own courts, but in reference to the parties at war, and to the danger of capture and condemnation abroad. This is the direct object of the stipulation. It cannot be limited to the naked position that the property is in fact neutral. It may be so and yet possess none of the *indicia* or evidences of neutrality. These evidences, it is not denied, the insured undertakes shall accompany it, and I think he equally undertakes that it shall enjoy the privileges of neutrality.

There appears to me no room for the distinction that the insured engages to furnish the evidences merely, and at the same time not to maintain his neutrality when it may be called in question. If the proper evidences accompany the subject, it is not legally to be presumed that its neutrality cannot be maintained. Whatever abuses may occasionally be committed we cannot act judicially, nor suppose the parties to have acted on the presumption of injustice in foreign courts. The idea is inadmissible when applied to the courts of a civilized nation, and if contemplated by the parties ought at least to have been

made the subject of a special provision in the contract. No doubt the underwriter may, by a special insurance, and the admission of a particular mode of proof, make himself liable even for the unjust sentences of foreign courts; but he ought never to be held liable for such sentences when proceeding on the very ground assumed by the insured himself. If neutrality can be called a risk, that risk is necessarily implied in the warranty; and the insurer, by the contract, is liable only to the remaining perils incident to the subject, allowing it to be neutral and to preserve that character. He engages for nothing more; and his premium must be deemed proportioned to those perils only. The effect of the representation or warranty, can, I think, on the face of the contract itself, admit of no other interpretation.

ALBANY.

 Vandenhuevel
 V.
 United Insur.
 Company.

If this reasoning be correct, it follows, that the insured, having represented or warranted the subject to be neutral, can never, on the terms of the contract itself, recover against the insurer when it appears to have been condemned on a ground which denies its neutrality. It is immaterial, in this view of the subject, whether the condemnation be just or unjust; it is sufficient if it proceed on the want of neutrality.

2. The question in the *English* courts does not appear to have been examined in this light. They have been content to apply to the decisions of foreign courts of admiralty, a principle which has long been received and adopted in their domestic courts. They place them on the same footing, and consider the conclusiveness of their sentences as necessarily resulting from the right of jurisdiction. In relation to their own courts the rule has undoubtedly been

ALBANY.
Vandenheuvel
 v.
United Insur.
Company.

long established, both before and since the revolution, and it is not confined to courts of peculiar or exclusive authority, but applies to all. Not only the sentences or judgments of their ecclesiastical and other courts, where they possess exclusive cognizance, but the decisions of all their courts in cases where they have concurrent jurisdiction are deemed to be equally conclusive. Indeed, a contrary position would involve the absurdity of a power competent to decide, and at the same time ineffectual in its decision.

They have also, in a variety of cases, extended the rule to foreign courts of a different description. Thus, a bill to be relieved against actions of trespass for seizing goods* in an island of *Denmark* was dismissed in chancery, because sentence was given in the court of *Denmark* on the seizure. So in case† of a bill of exchange, the acceptance of which was vacated in a court of *Leghorn*, Lord Chancellor King held not only that the cause was to be determined by the *lex loci*, but the acceptance having been vacated by a competent jurisdiction, he thought the sentence conclusive, and that it bound the court of chancery in *England*. So by Lord Hardwicke,‡ if a marriage be declared valid by the sentence of a court in *France* having proper jurisdiction, it is conclusive, and he held "that this was so, although in a foreign court, by the law of nations; for otherwise the rights of mankind would be very precarious and uncertain."

This doctrine applies, with peculiar force, to the sentences of courts of admiralty in relation to *prize*, and of every court proceeding on the general law of nations as the basis of its authority. While the cap-

* 1 *Ch. Cas.* 237.
 26 *Car.* 2.

† 12 *Vin.* 87. *pl.*
 9. 2 *Stra.* 732, 3.
S. C. best reported in *Viner.*
 (1726.)

‡ 1 *Vez.* 159.
 (1748.)

ture of enemy-property is admitted to be the right of a belligerent party, the institution of courts to try the validity of such captures must also be admitted. They exist in every country, and are established in our own. The objects of their institution are every where the same. They are invested with similar powers, pursue the same principles, and profess to be governed by the same system of laws, unconnected with the municipal regulations of any country. In this manner they form a separate and independent branch of judicature, and although uncontrouled by a common superior, their determinations, while they act with good faith, will generally be uniform and consistent. Considering them in this light, acting on the same principles, and governed by the same law, they come within the reason of the rule which is applied to domestic tribunals of concurrent jurisdiction, and their decisions ought to possess equal force and authority.

But another principle of *English* and *American* jurisprudence, arising from the nature of the subject and the system of our courts, appears to me strongly to enforce this doctrine.—The question of neutrality is involved in the general question of *prize*—it is a necessary incident, and the want of neutrality forms the principal ground of capture and condemnation. It is a settled maxim, that the courts of common law have no jurisdiction on the question of prize; it may collaterally arise, but *ex directo* it is not within their cognizance—it belongs solely and exclusively to the courts of admiralty as courts of prize.—This is established by a current of authorities both ancient and modern, and the reasons on which they are

ALBANY.
 Vanderhevel
 v.
 United Insur.
 Company.

ALBANY.
 Vandenheuvel
 v.
 United Insur.
 Company.

founded are satisfactory and conclusive. If then the courts of admiralty have exclusive jurisdiction of the principal question of *prize*, which necessarily includes that of neutrality, and the courts of common law have no jurisdiction, it must follow that the decisions of the former cannot be reviewed by the latter, and that whenever they occur directly or collaterally they must, like the judgment of other courts of peculiar jurisdiction, be considered as conclusive. If they were allowed to be reviewed, in what manner could we ascertain the merits of the former decision? Is the same evidence in our power, or in the power of the parties to obtain? The insurer is a stranger to the whole transaction; the circumstances are unknown to him; the proofs, if not detained abroad, are in the hands of his adversary; they are generally concealed, or may, with the greatest ease, be suppressed. How could he compel their production, or bring to light the merits of the case? To avoid these difficulties are we to be governed by the written depositions taken in the admiralty abroad, or could they be received as evidence? It is well known that the rules of evidence in those courts are different from our own. By what rules are we to be governed? If exclusively by our own, the result in our courts may differ, and yet both judgments as to the evidence on which they are founded be equally just. Allowing even that the insured engages merely to furnish the evidence of this neutrality in foreign courts, that evidence must surely be understood to be of a nature usually received and demanded in those courts; for it is there only that it can be material. The engagement, relating to such evidence of course ex-

cludes the idea of a decision upon any other, and the interference of a court of common law, requiring a different mode of proof, and acting on different principles, would contravene one of the direct objects of the stipulation. In every shape, therefore, in which this subject can be viewed, insuperable difficulties present themselves, and evince the propriety of considering the foreign sentences as final.

In *England* this question is at rest by direct decisions on the point, but these decisions were principally made during the period of our revolution, or subsequent to it—they possess, therefore, no conclusive authority, but under similar circumstances are to be regarded as we regard the decisions of the courts of all enlightened nations, high evidence of the law on the subject.

The cases in the *English* courts previous to the revolution are, however, not wholly silent on the question; so far as they relate to the general principle that the sentence or judgment of any court of competent jurisdiction is to be received as conclusive, they have already been noticed.

There are some which immediately apply to the sentences of foreign courts of admiralty.—The first in which the effect of such sentences appears to have been immediately considered, was the case of *Newland v. Horseman*,* in chancery. That was on a question of *freight*, which had been tried in the court of admiralty at *Barcelona*, where an interlocutory judgment was given.—Lord Chancellor Nottingham declared, that he would not slight their proceedings beyond sea, and if the damages had been there ascertained, or a peremptory sentence given, the same should have concluded all parties.—

ALBANY.
Vandenheuevel
v.
United Insur.
Company.

* 1 Vern. 21. 2
Ch. Ca. 74. S. C.
(1681.)

ALBANY.
 Vandenheuvel
 v.
 United Insur.
 Company.

* *Carth.* 32. 2
Show. 232. S. C.
 (1689.)

† An Irish ed.
 printed in 1761.
 p. 37.

‡ *Bull.* 244.

§ *Park*, 178. 3d
 ed. not else-
 where report-
 ed.

The next is the case of *Hughes v. Cornelius*,* in which, during a war between *France* and *Holland*, an *Eng-lish* ship was taken by the *French* under colour of being *Dutch*, carried into *France*, and there condemned by the court of admiralty as a *Dutch* prize. Afterwards an *Englishman* bought this ship, and brought her into *England*, where the right owner instituted an action of trover for the ship against the purchaser. This matter being found specially, the defendant had judgment, "because the ship being legally condemned as a *Dutch* prize, this court will give credit to the sentence of the court of admiralty in *France*, and take it to be according to right, and will not examine their proceedings, for it would be very inconvenient if one kingdom should, by peculiar laws, correct the judgments and proceedings of the courts of another kingdom." In the *Theory of Evidence*,* a book considerably ancient, it is stated, that "in an action on a policy of insurance, with a warranty that the ship was *Swedish*, the sentence of the *French* admiralty condemning the ship as *English* property was held to be conclusive."† The same case is repeated *in hæc verba* by Mr. *Buller*, in his *Nisi Prius*, and has received the sanction of his name. He cannot be understood to refer to the case of *Hughes* and *Cornelius*, as has been suggested, for that was not of a *Swedish* ship, nor on a policy of insurance. There is still another case‡ of *Fernandez v. De Costa*, in 4 Geo. III. before Lord *Mansfield*, at *Nisi Prius*, in which there was a warranty that the ship was *Portuguese*, and being condemned as not being *Portuguese* in the admiralty courts of *France*, the sentence of condemnation appears to have been considered as

decisive in favour of the insurer. In this case, it seems, the law was received to be settled as to the effect of the sentence, and the inquiry was confined to ascertain the ground on which it went.

ALBANY.
 Vandenheuvel
 v.
 United Insur.
 Company.

In answer to the two former of these cases a distinction has been taken between the direct and collateral effects of a foreign sentence, that it is conclusive only as to the transfer of property for the benefit of all claiming under it, but not so as to collateral parties. I do not perceive the force of this distinction.—If well founded it appears to me to operate in favour of the insurer; the insured, the professed owner of the property, must certainly be a direct party to the sentence, if any one is a party; he, therefore, if any one, must be concluded. Besides, from the nature of the proceedings in courts of admiralty, which are *in rem*, all persons are considered as bound. The forms and manner of proceeding in those courts are founded on the idea of notice to all the world, and the operation of their sentences is deemed to be equally extensive. The distinction now attempted, I do not find to be supported by any authority either before or since the revolution. Indeed, in *England*, the contrary rule prevails both with respect to their domestic and to foreign courts. It is general, that, “whenever a matter comes to be tried in a collateral way, the decree, sentence, or judgment of any court, ecclesiastical or civil, having competent jurisdiction, is conclusive evidence of such matter.”* It is not material that the parties to the suit should have been parties to the sentence; the only qualification of the rule, I believe, is to be found in *Prudham v. Philips*,† where Chief Justice *Willes*, in the case of a judgment alleged to be *obtained by fraud* in the ecclesi-

* *Theory of Es.*
 37. *Bull.* 244.
Amb. 762, 3. &
 the cases there
 cited. 2 *Black.*
Rep. 977.
 † *Amb.* 763.

ALBANY.
 Vandenheuvel
 v.
 United Insur.
 Company.

astical court, took a distinction in favour of a *stranger*, who could not come in and vacate or reverse the judgment, and, therefore, must of necessity be permitted to aver the fraud; but he held that the party to the suit was bound by the sentence, in relation to all other persons, and could not give evidence of the fraud, but must apply to the court which pronounced the sentence, to vacate the judgment. It is, therefore, always sufficient, if the one against whom the sentence is offered, was a party.

* *Doug.* 544.
Part. 359, 361,
 2—three cases.

I forbear particularly to examine the subsequent cases,* during our revolution, and since, which, if any doubt could before exist, have unequivocally settled the law in *England*. The principle on which they are founded, is, I think, sufficiently supported by the antecedent cases. The English courts appear to have viewed those cases in the same light, and without treating the question as *res integra* have adopted the rule they prescribe. Indeed, from the time of Charles II. to the present period, it appears to have received a steady determination by the highest authorities in their courts. With them it seems never to have been much questioned, and, I conceive the law with us, must be deemed to be equally settled. It may be added, that the same point arose in *Pennsylvania*,† and, although not directly decided, Judge *Shippen* inclined to consider the foreign sentence as conclusive against the insured.

† 2 *Dall.*

* *Emerigon*,
 457 to 464.—
Val. 112. *art.*
 48. See also
Rocr. n. 54.

In *France*, the law is undoubtedly otherwise settled.‡ Their courts have adopted a different rule at an early period, and the authorities on which they proceed, in cases of new impression, would merit great attention and respect; but independent of the circumstance that they confer no obligation on our

courts, I think they do not comport with the sound interpretation of the contract, nor with the system of our jurisprudence. The English courts, on questions of commercial law, are to be regarded as at least equally enlightened and correct, and their authority, before the revolution, repeatedly sanctioned and confirmed by subsequent determinations, imposes an obligation which the former do not possess.

ALBANY.
 vandenheuevel
 v.
 United Insur.
 Company.

In every light, therefore, in which I have been able to view the subject, I am of opinion, that the foreign sentence ought to be deemed conclusive against the plaintiff's right to recover on the policy.

1. From the nature and import of the contract itself, by which I consider the insured to have guaranteed his neutrality and undertaken to maintain it, and, of course, liable to all the perils attending it.

2. Because the condemnation is to be considered as conclusive evidence of the want of neutrality, it being the sentence of a court, not only of a *competent* but *exclusive* jurisdiction on the subject.

KENT, J. This cause is on a policy upon the cargo and freight of the ship *Astrea*.

The facts are these.

The voyage was from *New-York* to *Corunna*, in *Spain*, and the ship was described as the good American ship the *Astrea*; and previous to the time of signing the policy, the plaintiff, in a written application for that purpose, to the respective defendants, represented the property to be *his own*. The ship was captured on her voyage by a British frigate, carried into *Gibraltar*, and by the court of vice-admiralty there, the ship and cargo were condemned as lawful prize, as belonging, at

ALBANY.
 Vandenheuvel
 v.
 United Insur.
 Company.

the time of the capture, to *Spain*, or to persons, being subjects of the king of *Spain*, or inhabiting within the territories of the king of *Spain*, enemies to the king of *Great-Britain*.

If the plaintiff is not to be adjudged concluded by the sentence, it is then admitted in the case, to be a fact, that the ship and cargo were the plaintiff's property.

The plaintiff was born a subject of the *United Netherlands*, and became a citizen of the *United States*, on the 3d day of *June*, 1793, and has since resided in the city of *New-York*.

Upon these facts, the whole question between the parties, turns upon the effect of the sentence of condemnation. If that is to be deemed conclusive proof of the facts therein stated, the policy is void, by reason of a breach of warranty, and by reason of a *material misrepresentation*, which led the underwriters to compute the risk upon circumstances which did not exist.

The sentence substantially *falsifies* the representation, for the persons, stated in the sentence as owners of the property, and the plaintiff, were evidently understood and intended to be different persons.

After the opinion which I have already given upon the question, in the cases of *Ludlow* and *Dale*,* and of *Goix* and *Low*,† I might well be excused from entering again upon the subject, unless, in the mean time, I had seen sufficient reason to change that opinion. The question has, indeed, been since presented in a way the most propitious to a liberal reconsideration of its merits. The authorities, and the principles they contain, have been examined at the bar,

* *January*, 1799.

† *April*, 1800.

X support 348

with a diligence and ability, that have greatly aided our researches, and thrown light on the avenues to truth. It seems, then, in a degree due to the occasion, to the elaborate and anxious care which has been bestowed on the subject, that I should once more, but very briefly, and without recapitulating what I have before said, take some further notice of the argument.

ALBANY.
Vandenheuevel
v.
United Insur.
Company.

The true point in controversy is not what *ought* to be, but what in fact *was*, the legal effect of a foreign sentence of condemnation, in a case like the present, by the common law, as understood and settled when our revolution began. I shall confine myself in this opinion, to the examination of this *single* point.

Let us first inquire what is the effect of a domestic judgment.

It is laid down as a general rule,* that whenever a matter comes to be tried in a collateral way, the final sentence of any court, having competent authority, is conclusive evidence of the matter so determined, in all other courts, having *concurrent* jurisdiction; for, it were very absurd that the law should give a jurisdiction, and yet not suffer what is done by force of that jurisdiction to be full proof.

* Buller's N. P.
244, 245. Amb.
761. Freeman,
84. Str. 733.
Harg. Law
Tracts, 465, 469.

It has, however, been made a doubt by some,† whether such sentences upon jurisdictions, having concurrent authority, be conclusive, or only *prima facie* evidence of the fact, although I think the better opinion is in favour of their conclusive effect.

† Harg. 477. 3
Mod. 231.

But if a matter belongs to the jurisdiction of one court so *peculiarly* as that other courts can only take cognisance of the same subject indirectly and incidentally, the rule is then more extensive and un-

ALBA NY.
 Vanderbeuvel
 v.
 United Insur.
 Company.

* Hargrave's
 Law Tracts,
 452, 467, 470,
 477.

equivocal.* The latter courts are bound by the sentence of the former, until it be reversed, although it be in a suit *in diverso intuitu*, if it be directly determined, and must give credit to it universally, and without exception.

This rule has been illustrated in the case of sentences in the ecclesiastical courts touching marriages and wills; in the exchequer, touching the condemnation of forfeited goods; and in the admiralty, touching prizes, and in all of which cases, those courts have exclusive jurisdiction.

In respect to the ecclesiastical courts, the authorities are numerous, and have spoke an uniform language from the time of lord *Coke* to the present day. In two cases, to be found in his reports,† the judges determined that they were bound (although it was even against the reason of the law) to give faith and credit to the sentences of the ecclesiastical courts, for *cuiuslibet in sua arte perito est credendum*; and that, if the ecclesiastical judge sheweth cause of his sentence, yet, forasmuch as he is judge of the original matter, they shall never examine the cause whether it be true or not.

‡ 2 Lev. 14. 1
Freeman, 83.
Carth. 225. 1
Salk. 290. *Skin.*
 493. *Str.* 960.
 961. *Amb.* 761.
Harg Law
Tracts, from
 452 to 479.

§ Harg 457.
 471. *Bul. N. P.*
 245.

* 4 Co 29 a.
 † *Str.* 691. 3 *Bro.*
P. C. 62. *S. C.*

‡ *Str.* 690.
Amb. 763.

All the subsequent cases say the same thing.‡

This conclusive effect of the sentences of the spiritual courts applies to *strangers* as well as to parties and privies. They are conclusive evidence of the fact against all the world.§ In one of the cases from *Coke*,* and in the case of *Hatfield* and *Hatfield*,† which was finally determined on appeal in the house of lords, in 1725, the sentence was held binding on strangers. In a case before lord *Hardwicke*, and in a case before chief justice *Willes*,‡ strangers were

allowed to use the sentence against those who were parties.

The same doctrine is established in respect to condemnations in the exchequer. This fully appears from the case of *Scott and Shearman*,* in which it was held by Mr. Justice *Blackstone*, in a very elaborate argument, and in which all the court concurred, that the condemnation in the exchequer was conclusive; not only *in rem* but *in personam*; not only in the property vested in the crown, but as to every other collateral remedy; not only as to the party to the suit but as to the right owner, although no party, and against all the world. The seizure itself was held to be notice to the owner.† The law gives implicit credit to the judgments of competent courts, and it was afterwards observed by chief justice *De Grey*, that the decision in that cause had been the uniform law for above a century.‡

It seems to be every where taken for granted, that the sentences of admiralty courts are equally final.§

The rule, then, I have mentioned in respect to domestic judgments, has received all the sanction that a continued train of decisions can possibly give it.

We are next to see whether the same rule, as appearing to be directed by the same reason, has not been applied with equal uniformity to foreign judgments.

The most ancient case to be met with in the English books, is the case of *Hughes and Cornelius*.*— Although the special verdict in that case falsified the sentence of condemnation in the French admiralty, yet the court admitted the sentence to be true; and although the suit was trover, in which, nothing but

ALBANY.
Vandenheuvel

v.
United Insur.
Company.

* 2 Black. Rep. 977.

† This law, as to notice, confirmed, 4 Durnf. 191.

‡ 2 Black. Rep. 1176.

§ 1 Show. 6. 3 Mod 195—note. Harg. 467. 2 Ld. Raym. 893. 1 do. 724. Co-myn's Dig. tit. Admiralty, E. 17.

* Raym. 473. 2 Show. 242. Skinner, 59. S.C.

ALBANY.
Vandenheuevel
 v.
United Insur.
Company.

the direct effect of the sentence came necessarily into view, yet the court, in giving judgment, laid down this general doctrine, applicable equally to collateral effects, viz. That they ought to give credit to foreign sentences of admiralty, and take them to be according to right, and not to examine their proceedings; that this was agreeable to the *law of nations*, and sentences in courts of admiralty ought to bind generally according to that law; that if the party was aggrieved he ought to petition the king, it being a matter of government, and if there appear cause, he will instruct his liege ambassador, and on failure of redress, will grant letters of reprisal.

This decision, and the principle contained in the judgment, were afterwards cited and sanctioned by lord *Holt*, and again by lord *Hardwicke*, and lastly, by professor *Wooddeson*, in the course of his *Vine-rian lectures*.*

* *Carth.* 32.
 1 *Atk.* 49. 2
Woodd. 456.

A similar doctrine has been repeatedly advanced, and, whenever the occasion arose. Instances of this are to be met with in the successive decisions of the chancellors *Nottingham*, *King* and *Hardwicke*.†

† 1 *Vern.* 21.
 2 *Str.* 733.
 1 *Vesey*, 159.
 † *Ridgeway*, 266,
 267.

In the case of *Gage* and *Bulkeley*,‡ before lord *Hardwicke*, Sir *D. Ryder*, who was then attorney-general, laid down the rule in its fullest latitude, and as being well established. He said that foreign judgments were received in *England* as conclusive evidence, and had the same regard paid to them, for the sake of justice and public convenience, as sentences given in the courts of admiralty or ecclesiastical courts at home; and he cited the case of *Hamden* and *The East-India Company*, which was determined upon appeal in the house of lords, and on the

ground, that the sentence of a Dutch admiralty was conclusive evidence, it being *res judicata*, and could not be unravelled or re-examined. Although what he said was merely *arguendo*, yet, coming from such an eminent counsel, and appearing to be taken for granted by the court, it is pretty good evidence of the prevailing sense on the subject.

ALBANY.
Vandenheuevel
v.
United Insur.
Company.

Here we may also notice the answer of the judges (of which Sir *D. Ryder* was one) to the Prussian memorial, as being a document of very high authority, and bearing on the question before us.* It is there stated, that prize-courts are by the maritime law of nations; that in every country there is a court of review, to which the parties who think themselves aggrieved, may appeal; that if no appeal be offered, it is an acknowledgment of the justice of the sentence by the parties themselves, and is conclusive; that captures have been immemorially judged of in that way in every country of *Europe*, and with the approbation of the powers at peace; that every other method of trial would be impracticable and unjust, and that, if prize-courts proceed contrary to the law of nations, and treaties *in re minime dubia*, then, and not till then, the neutral has a right to complain.

* 1 Col. Jurid.
101, 102, 106.

This answer, and the principle contained in the case of *Hughes* and *Cornelius*, may be considered as a correct commentary on the law of nations, relative to the effect which judicial sentences in one country are to receive in the courts of another.†

After such a repeated and general recognition of the principle, we are prepared to expect an application of it (for that is all that is now wanted) to the case precisely the same with the one before the court.

† Grotius, l. 3.
c. 2. sec. 5. Vatt.
l. 2. sec. 84, 85.
Martens, 104.
105. Erskine's
Institutes, vol 2.
735.

ALBANY.
 Vandenheuevel
 v.
 United Insur.
 Company.

* P. 244.

† P. 37. This
 book was pub-
 lished in 1761.

We do, accordingly, find it stated as law, in *Buller's Nisi Prius*,* that in an action upon a policy of insurance, with a warranty that the ship was *Swedish*, the sentence of a *French* admiralty court, condemning the ship as *English* property, was held conclusive evidence. The same case was previously stated in the *Theory of Evidence*,† to have been decided, and *Park* gives us a particular report of another decision of the like kind, before lord *Mansfield*, at the sittings after *Hilary Term*, 4 Geo. III. in the case of *Fernandez* and *Da Costa*. A ship was insured, and warranted a *Portuguese*; she was libelled and condemned in a *French* court as not being *Portuguese*, and although the plaintiff gave partial evidence of her being *Portuguese*, yet, when the defendant produced the sentence, it concluded the cause.

Where, then, can we discover a doubt, as to what was the law at the time of our revolution? Upon what ground can we pause even to raise a conjecture, that the court of King's Bench, in the case of *Bernardi* and *Motteux*,‡ (being the first cause after the year 1776) created a new rule, when even the counsel for the plaintiff, at the very outset of the argument, admitted, that if the sentence of the *French* admiralty had proceeded on the ground of the property not being neutral, the plaintiff would have been concluded.

Nor do I think the *English* decisions, since the year 1776, are to be thrown *wholly* out of view, although they are confessedly of no binding authority.

In addition to the consideration of the well known character of their judges, we are to observe that their

tribunals and ours, study and pursue the same code of law and of equity, and that they are certainly not more liable than we ourselves, to misapprehend the authentic records and oracles of the common law.—
 If the question, therefore, were otherwise involved *in doubt*, a series of uniform decisions in the *English* courts, for the last twenty years, cannot but be considered,⁶ and that, too, without being unduly addicted *jurare in verba magistri*, as a very sufficient cause to remove it.*

Having thus ascertained, at least to my satisfaction, that by the law, as it stood in 1776, a sentence of condemnation abroad, on the direct point in question, is, in a collateral suit by the insurer, conclusive evidence of a breach of his warranty, so that no evidence can be admitted to impeach it, I have done all that I undertook to do. I might here rest the argument. Whatever opinion may be entertained, as to the justice or policy of the rule, is not to the purpose. Our duty is *jus dicere, non jus dare*. I may be mistaken, but it appears, however, to me, that all the reasons which have established the rule relative to domestic courts, having exclusive jurisdiction of a subject, apply with *peculiar force* to a case like the present.

Courts of law are inadequate to determine the question of prize, and to overhaul the sentence is in reality trying that question. The circumstances that go to constitute prize, are oftentimes complex.—The property may be deeply masked, the papers double, or every requisite paper may be regular, and yet the conduct of the master such as to cause the property to *lose* its privilege of neutrality. None but

I. 1

ALBANY.

Vandenheue
 v.
 United Insur.
 Company.

* *Doug.* 575.
 610. 614 to 617.
 705. *Barzillay*
v. Lewis, De
Souza v. Ewer,
and Saloucci v.
Woodmason, ci-
 ted by *Park*—7
Durnf. 523, 681,
 705. 8 *Durnf.*
 196, 232.

ALBANY.
 Vandenheuvel
 v.
 United Insur.
 Company.

* 8 Durnf. 234, 444.—A warranty of neutrality, means that the ship shall maintain a neutral conduct and not forfeit it during the voyage.

a court clothed with the mode of proof, the summary powers, the enlarged discretion of a prize-court, can seize, and sift every circumstance. The maritime law of Europe, has, therefore, very wisely established a peculiar court, for the exclusive jurisdiction of prize. It is there that the assured should vindicate his property, and if aggrieved, he should carry his appeal to a court of review. There is great weight in the observation, that this is the true construction of the engagement, on the part of the assured. By representing, or warranting his property to be neutral, the assured undertakes, not only that it is so in *fact*, but that it shall be *entitled* to neutral privilege, *throughout the voyage*.* To construe the engagement to be *less* than that, is in a great degree, to render it idle and nugatory. "To implement this warranty," says a very sensible writer on insurance, (*Millar*, p. 496.) "the ship or goods must be neutral *in conception of that nation from whom danger of seizure is apprehended*." On such a representation or warranty, the insurer lays out of view the risk of loss, by reason of the non-neutrality of the property. That risk the assured takes upon himself, and having in his hands, exclusively, all the *means* to do it, he is bound to make good his *avowment*, whenever, and wherever the neutrality of the property, or its privilege as such, is called in question. If he fails to do it, he must bear the loss, and if foreign sentences were liable to be re-examined here, I should still incline to think, that in the case of an *express warranty*, the assured, and not the insurer, takes upon him the risk of the condemnation, *right or wrong*. Whether that would or would not be the

case, on a *representation* merely, I am not as yet prepared to say, and therefore, in those suits, where there was no warranty, but only a representation, I should choose to rest my opinion, entirely on the first ground, of the faith due to the foreign sentence.

ALBANY.
 Vandenheuevel
 v.
 United Insur.
 Company.

The result of my opinion, accordingly, is, that the plaintiff is not entitled to recover in this cause, beyond the return of his premium.

On the judgment rendered in conformity to the foregoing opinions, the now plaintiff *Vandenheuevel* brought his writ of error, insisting that the judgment was erroneous—

1. Because there was no warranty in the policy, and, therefore, the defendant assumed every possible risk.

2. Because the order for insurance, if it amounted to a representation, must have been understood by both parties merely as a representation that the property belonged to the plaintiff, not that it was neutral or *American*.

3. Because the sentence of condemnation does not negative the representation : And,

4. Because, if the representation amounted to an explicit warranty of the neutrality of the property, the jury have found it to be true, and the sentence ought not to be received as evidence to the contrary.

1. We say, there being no warranty in the policy, the underwriter took upon himself every hazard, and particularly those arising from the character and quality of the property.

The policy on record contains nothing like a warranty of any kind. Mr. *Vandenheuevel* is not stiled a

ALBANY.
 Vandenheuevel
 v.
 United Insur.
 Company.

citizen of the *United States*—nor is there an expression in it which can be tortured into an intimation of the country or community to which he belonged; he had no doubt heard, how extremely jealous our courts were of foreigners assuming the name of *American*; he also knew, probably by woful experience, that many of the *West-India* judges, those oracles of modern law, were also of opinion that a *Dutchman* had no right to expatriate even for the purposes of commerce; it may likewise have come to his ears, although he must have been endured with more than common intellect to comprehend its meaning, that a foreign sentence, silent as the tomb, would proclaim in loud, unequivocal and conclusive terms, that *he was no American*. With all this information, well calculated to inspire apprehension and caution, he makes the present insurance. For a moment, he is tempted to save a part of the premium, and warrant his property neutral: He has resided in *New-York* more than five years—his certificate of naturalization bears testimony of his citizenship—the property he knows to be his own, and he is on the point of calling it *American* in the policy. This was true, and would have reduced the premium considerably: But, on further deliberation, he resolves to forego every benefit which his naturalization and neutral character give him, and to pay a war-premium without the embarrassment of a warranty. The policy is framed accordingly; not a letter in it purports a warranty of any kind. Was the instrument then to be our guide, as it ought to be, we should arrive at a correct decision without difficulty, and without opposition from a sentence more impregnable, if possible, than the invincible fortress whence it issued.

The policy being for the benefit of every one to whom the property may appertain, would cover not only his own goods but even those of a belligerent merchant: "These words," says the learned *Emerigon*, "comprehend *Frenchmen*, as well as neutrals. The expression is general, and such should be its interpretation, especially in the present state of affairs, (*France* being then at war) when it is clear that if the insurance had been intended for a neutral, it would have been so declared in *express terms*—the assurers, therefore, he continues, have no pretext for saying they were deceived."—*Val. Ord. Mar.* 2 vol. p. 120. The underwriters, in the case *Emerigon* is speaking of, complained that they had not been apprized of the property belonging in part to *Frenchmen*. This author, not less celebrated for a pure and unblemished life, than for his professional labours and skill, evidently supposes no property in time of war should be deemed *neutral*, unless *expressly* so stated in the policy. Some judges in this country have intimated an opinion, that all property in time of war must be taken as belonging to neutrals, unless otherwise called in the policy. Should this case come to the hands of any gentlemen who have fallen into this error, the mischiefs of which to our merchants surpass calculation, I beg them to peruse the author just cited—if his arguments, in which the vigor of a great mind, and the perspicuity of a man who fully understands himself, ever appear, are not followed by conviction, nothing I can say will be attended to. Mr. *Vandenheuevel*, neutral as he was, did not think it safe to pursue the advice of this great man, and describe himself and property as such. Whatever rights neutrals have had and maintained, Mr. *Van-*

ALBANY.

 Vandenheuevel
 United Insur.
 Company.

ALBANY
 Vandenheuvel
 v.
 United Insur.
 Company.

denheuvel knew, that at this day, every such pretension is abandoned, and that citizens of this description are given up by the courts of their own nation to be buffeted and plundered by the worse than inquisitorial tribunals of the powers at war : In the same case it is mentioned that underwriters are bound to pay for an *unjust* capture ; this is common sense, and therefore we must not be surprised to find that it was law in the days of *Emerigon*. But the plaintiff recollected, that in the present day a rage for improvement pervades every rank in society ; that not only philosophers, but ministers of justice, were infected with the pernicious mania ; that judges in *England*, with not more learning or industry than their predecessors, were innovating on their venerable institutions. He feared, perhaps, that the same spirit of refinement might extend to this side of the Atlantic : to be safe therefore in every possible event, he effects an open policy, unfettered with any warranty, stipulation or condition whatever. But even the caution and sagacity of a *Dutchman* cannot secure him :—He unfortunately writes a letter, and although this forms no part of the contract, it is now produced in judgment against him : this weapon shall also be wrested from the hand of his adversary, and employed in his defence. If the policy contains not internal and satisfactory evidence, that no neutrality was to be warranted, such intention results most irresistibly from this very letter, or order for insurance : This we say,

2. Amounted only to a representation that the property *belonged to Mr. Vandenheuvel*, not that it was *American*.

1. From the express terms of the order.
2. From the course of the transaction.

The distinction here relied on between calling the property *his own*, and calling it *American*, is important, in case this abominably wicked *Gibraltar* sentence is to be enforced against him. He will therefore be permitted to shew not only that a distinction exists, but was intended and understood.

The representation is that the premises insured were the *property of John C. Vandenheuvel*. This, say the underwriters, and the Supreme Court, is equivalent to calling the property *American*. Whence is this inference drawn? Not from the name; this is most unequivocally *Dutch*; not from the place of his nativity; this it is admitted, was in the *United Netherlands*; nor from his looks, every underwriter at first sight would pronounce him a foreigner; nor from his speech, for although he speaks *English* very well, the accent of his mother country is perceptible in every sentence; nor could it be presumed from his residence in *New-York*; this the Supreme Court have said in the case of *Campagne v. Deyne*, is not worth a rush. Still less was it to be collected from his naturalization; this Judge *Kellsall* has pronounced, in the case of poor *Duguet*, (and his sentence has also been affirmed) a sin against his natural allegiance, and a violation of the rights of the belligerent parties. The truth is, Mr. *Vandenheuvel* did not choose to say whether he was a subject of the emperor of *Morocco*, a citizen of the *Batavian* republic, or a sachem of the *Tuscarora* tribe of *Indians*. This they were to guess at as well as they could. He knew that foreign admiralities were in the habit of metamorphosing the national character of a merchant *ad libitum*; but he had never heard of their undertaking to change the name of an owner. He was not afraid, therefore, of their

ALBANY.
 Vandenheuvel
 v.
 United Insur.
 Company.

ALBANY.
 Vandenheuvel
 v.
 United Insur.
 Company.

saying, that the property did not belong to *him*. To this he knew the papers and testimony would give the lie direct. He only apprehended their calling him a *Spaniard*, a *Dutchman* or a *Turk*, as the interest of the moment might dictate. He therefore contented himself with saying that the cargo belonged to *himself*. The light in which he might be received abroad, was left at the risk of the underwriters. It requires uncommon ingenuity, according to *our* doctrine, (for in respect to naturalized or resident citizens, the *English* courts are infinitely more liberal than the Supreme Court) to ascertain Mr. *Vandenheuvel's* national character. His ancestors must have been subjects to *Philip* king of *Spain*. Those who maintain the divine and hereditary right of kings, and the perpetual and indefeasible obligation of natural allegiance; may stile his ancestors rebels and himself a *Spaniard*; others may call him a *Dutchman*, because he was born a subject of the Prince of *Orange*, or as the Stadtholder has expatriated, (which by the bye, he had no right to do, according to the modern law of nations) they may think him a citizen of the *Batavian* republic. Others, again, considering his oath of allegiance to this country, his residence and naturalization, may be disposed to think, in opposition to the Supreme Court, that he is really and truly, a citizen of the *United States*. This, it must be confessed, is a knotty point and must be left *exclusively* to the decision of an admiralty judge. But with such various pretensions why should the underwriters take him for an *American*? They had no more right, from what passed, to consider him a citizen of this country, than Judge *Morrison* had to pronounce him a *Spaniard*.

3. From the nature of the transaction.

ALBANY.

During a war, underwriters ever distinguish between enemy and neutral property : For the former they have a higher premium, and the policy is against all risks. In the latter case, as the premium is much lower, they take care to have the neutrality of the property stated in the policy. When this is omitted, the presumption is fair, that they regard the property as *enemy*, and receive a premium accordingly. Not an instance has occurred this war, wherein an underwriter meant to insure neutral property, *as such*, without its being expressly so declared in the policy. If, in this instance, the contract had been intended to be of that kind, most certainly they would have taken care the policy should speak for itself. They would not have trusted to a slip of paper, which, by the negligence of a broker, or other casualty, might be lost or destroyed.

Vanderheuevel
v.
United Insur.
Company.

Again, great injustice will be done to Mr. *Vanderheuevel* by the construction attempted to be put on this contract. It is become a general practice with merchants, who warrant their property neutral, to provide, by a proper clause, that a foreign sentence shall not preclude other proof. This would have been done here, if either party had supposed the goods *American*. From this benefit, the plaintiff will be precluded, and that by the negligence of the defendant, who should have insisted on this stipulation, if he intended, at a future day, to avail himself of it. His not making this a part of the contract is a clear proof that he did not underwrite the property as neutral, and received a premium accordingly.

If our interpretation of the order, which leaves no room for construction, be just, it follows—

M m

ALBANY.
 Vandenheuvel
 v.
 United Insur.
 Company.

4. That the sentence of condemnation is not at variance with the representation.

"The property is condemned as belonging to *Spain*, or to persons being subjects of the king of *Spain*, or inhabiting within the territories of the king of *Spain*, enemies to the king of *Great-Britain*."

Mr. *Vandenheuvel* has not said he was not a subject of the king of *Spain*; a person may, by swearing allegiance to different sovereigns, become the subject of several countries. We have many *British* subjects among us who are *American* citizens, but who would be treated as traitors by the mother country, if taken in arms against it. So that, for aught that appears, the plaintiff may have sworn allegiance to the king of *Spain*, and yet the property may fall within the letter of his representation, which only declares it to be his own. It is admitted he was born in *Holland*, and the *British* courts of admiralty, if they govern themselves by the decisions of our supreme court, would have confiscated it, although he had produced his letter of naturalization. It was, no doubt, to guard against this very event, that he cautiously avoided declaring to what country he belonged. He knew he was an *American* citizen, but he could not tell that foreign courts would consider him as such.

The cargo was too valuable, not to have brought his case within some of the new-fangled principles, which have lately been adopted to reach neutral property. He knew, also, that by the law of nations, and by that of *England*, he was entitled, for every purpose of trade, to be regarded as an *American*; but he as well knew, that boards of admiralty re-

spected no law. He was determined, therefore, not to expose himself to any embarrassment that might arise from the iniquity of their proceedings, or to put it in the power of the underwriters to avail themselves of any sentence they might pronounce. He could not, however, foresee the length which the supreme court would go in giving effect to such sentence. He little imagined, that presumption on presumption would be raised to defeat his recovery.

ALBANY.
 Vandenheuvel
 v.
 United Insur.
 Company.

1st. It is presumed that he is an *American* citizen. This is in direct contradiction to the decision in the case of *Duguet*. Then it is presumed he meant to warrant the property *American*, although nothing of the kind appears in the policy. Next, it is presumed he meant to represent it as such, although the order for insurance conveys a meaning totally different. Then it is presumed, the property was not *American*; because, the judge, appointed specially for the purpose of condemning neutral property, has said it belonged to *Spanish* subjects.— Lastly, it is presumed not to belong to Mr. *Vandenheuvel*, although his name does not appear in the decree. There must be some uncommon sanctity in these decrees, where so much pains, and such forced constructions, are resorted to for their support.

But if all these presumptions must be made in a case where every honest feeling must take part with the assured, we say—

5. That the jury having, by their verdict, verified the truth of his representation, the sentence cannot be received as evidence to the contrary.

That a sentence abroad, ought, in no instance, to conclude the assured, was shown in the case of *Goix*

ALBANY.
 Vandenheuevel
 v.
 United Insur.
 Company.

v. *Low*, which is now before this court. Referring to that argument, we shall only insist, that there is a real and acknowledged distinction between a representation and a warranty; and that among all the unintelligible and contradictory *British* cases, *not a single* decision is to be found, in which this outrageous principle has been applied to the case of a representation.

If such sentences are conclusive against one representation, why not against another? In that case where are we to stop? Representations are infinitely more diversified than warranties. One man in his instructions to insure, calls his vessel a *ship*—she is condemned, because she is a *brig*. Another says, the crew are all *New-Yorkers*—she is sentenced, because one of them *was born in Boston*. A third says his vessel is an unarmed merchantmen—she, too, falls a prey; and without a particle of proof, it is stated by his honour, that she was armed with thirty-six guns, *all twenty-four pounders*. This, too, must be conclusive; for, although the vessel insured, should appear to be an *Albany* sloop of only fifty tons, our courts would be compelled to believe, that by some miracle, she had strength enough to carry guns of that caliber, and would think it very disrespectful in the owner, to hint at the impossibility of the thing.

A merchant will soon find it difficult to write an order for insurance—he will hardly dare to open his lips. If he tells the truth, and has a hundred witnesses to attest to it, it may, by and bye, be contradicted by a judge, of whose existence he had never heard, or who may be one of the herd that infest

the *West-India* islands. He will be compelled to be silent, or the most he will dare to say to the broker will be, "tell the assurers the name of the vessel, and the voyage; pay whatever premium they ask; answer no questions. Say not that the vessel is painted white or black; that she has two or three masts; that she is armed or unarmed. If they suspect the property belongs to the *French* Consul or the Grand Seigneur, and therefore demand a higher premium, do not undeceive them; pay at once the additional sum they ask. I know I am a native *American*, and that the property is mine; but rather than give a hint of the kind, which will be twisted into a warranty or representation, I will submit to pay five or six thousand dollars more and have no trouble about it."

ALBANY.
Vandenhoevel
United Insur.
Company.

Thus will every *American* be driven to the necessity of carrying on trade as a belligerent subject, to avoid becoming a victim of the fascinating doctrine, that admiralty judges can do no wrong; and that their righteous decrees are to bind all mankind, from the rising of the sun to where he goeth down. The decisions of *Sancho*, while governor of *Baratraria*, notwithstanding the sagacity which the squire discovered, and the high reputation in which they have hitherto been held, must now, like every thing human, pass away. His judgments were the result of common sense and common honesty, (for luckily for his subjects, he knew nothing of the law of nations) but they bound only the inhabitants of a small island: the *West-India* sentences, on the contrary, pervade the globe, and proceed on the eternal and immutable laws of God and of nature, which no earthly conside-

ALBANY.
 Vandenheuevel
 v.
 United Insur.
 Company.

ration would have tempted judge *Morrison* to violate. What a pity 'tis, that his honor did not disclose to us the grounds of condemnation. The truth is, there was found on board a letter in cypher, from the *French* Consul at *New-York* : It was this innocent epistle which occasioned the forfeiture of a most valuable property : And yet this decree, this offspring of darkness and oppression, this outrage on neutral rights, this satire on justice, must be received as conclusive evidence, that the property belonged to the king of *Spain*, who, it seems, has lately become a merchant, although the very judge who pronounced it, must have been satisfied, from the documents before him, that the ship and cargo actually and entirely belonged to the plaintiff.

There being neither a warranty, nor representation as to the property's *neutrality* in this case, it must be superfluous minutely to examine how a foreign sentence should be treated in this country. I shall therefore only subjoin a summary of the reasons why, even in case of express warranty, a sentence should be conclusive of nothing, except that the property was actually condemned, and that therefore, the assured was entitled to recover.

1. It is contrary to the written contract, and the true understanding of the parties. The high premium paid by neutrals during a war, is to be protected against *unjust judgments*. It is not within human ingenuity to assign another plausible reason, why neutral property should, in a war between other powers, be burthened with so great an addition of premium. Is it not then absurd and unjust to say, that by such a sentence, *the risk*, which was so much apprehended,

and the *principal* one intended to be guarded against, shall bar a recovery? Not all the art of man, nor powers of the human mind, can reconcile this plain, obvious, and true construction of the instrument, with the doctrine of a foreign sentence being conclusive.

ALBANY.
 Vandenheuevel
 v.
 United Insur.
 Company.

2. It is a capture at sea which gives to the assured a right to abandon. This being made, fixes the condition of the parties. A subsequent judgment cannot alter or vary their rights. "If an abandonment be made, the *assurers*" says *Emerigon*, "are alone interested in the sentence which may be pronounced; and if the ship be declared good prize, contrary to the law of nations, or the laws of war, the underwriters must suffer by it. If the property be released, it belongs to them in virtue of the abandonment. But what fixes," says he, "the condition of the parties, considered in itself, is *not the judgment rendered by the tribunal of a foreign and hostile monarch*. It is the *abandonment*, made or not made; it is the *capture*, that confers the *right* of abandoning." See *Valin*, vol. 2. p. 122.

Here, in few words, without any affectation or display of learning, we have a just and correct construction of an important expression in the policy, a want of attention to which has occasioned all the confusion and absurdity of modern adjudications. It had not occurred to this profound lawyer, how an unjust sentence, which must necessarily be subsequent to a capture, could defeat the rights of the assured, which that event, followed by a timely abandonment, had rendered perfect and indefeasible: Nor could his penetrating mind discover, how any question, arising

ALBANY.
Vandenheuevel
 v.
United Insur.
Company.

on a policy, could be influenced by proceedings which were carrying on, *in rem*, at many thousand leagues distance, and in the absence of all the parties : Still less could he perceive why the tribunals of his own country should forbear to inquire into the truth of a fact, which had probably never been agitated abroad. But no study or reflection could have brought him to comprehend why a court in *France* should not decide according to *facts admitted by both parties*, (as is the case here) merely because a foreign tribunal had condemned the property as prize : He therefore considered the vessel, after capture and abandonment, lying entirely at the risk of the underwriters, and that the consequences of a condemnation, just or unjust, must be borne by them. This, however, did not deprive the underwriters of any defence arising out of the peculiar quality of the property, or the misconduct, or misrepresentation of the assurers. Such questions frequently must have arisen : when they did, they were decided according to evidence, as in other cases, by the *French* courts, who saw no reasons for transferring to a petty tribunal, in the east or west, matters which they themselves were competent to determine, and respecting which they possessed full and complete information. Under this order of things, the assured contended on equal ground with his adversary : his witnesses were heard, his papers examined, and his character and reputation were not totally lost sight of. Under the new state of things, his reputation, his witnesses, the fairness of his conduct, and regularity of his papers, avail him nought : In short, he has no more chance of succeeding against an underwriter, who is protected by an unjust

foreign sentence, than the property itself, perhaps a valuable Indiaman, had of being released from the gripe of a corrupt and rapacious admiralty judge.

ALBANY.
Vandenheuvel
v.
United Insur.
Company.

3. If these sentences are received as conclusive, great injustice will most certainly, and invariably follow ; which will be avoided, by permitting the assured to prove his warranty. This argument should exclude the reception of these sentences : by doing so, injustice may be done ; in the other way, an improper decision is impossible.

4. These courts being governed, not by the law of nations or of war, but by arbitrary mandates of their respective sovereigns, it is folly in the extreme, to pay any deference to their decrees.

5. If they were truly governed by general, fixed and known rules, their modes of proceeding, are too unfriendly to truth, to receive their sentences, as evidence of any fact whatever.

6. It is extremely difficult, and so allowed to be on all hands, even when the cause of condemnation appears, which is not often, to discover by what rule the judge has come to his conclusion ; it is, therefore, not just to say, it *must have been* for this or the other reason.

7. It is impolitic to give any credence whatever, to these decrees, except when it is attempted to disturb their *direct effects*.

8. By admitting the assured to prove his warranty, these sentences are neither opened or reviewed ; a contrary supposition has been the source of much error on this subject.

Upon the whole, a case more to be favoured, never presented itself to a court ; the plaintiff has

N n

ALBANY.
 Vandenheuevel
 V.
 United Insur.
 Company.

acted with good faith throughout ; if he has really made any representation, as to the neutrality of his property, which he denies, the defendants admit he has said no more than what is true. He sees no reason, therefore, why he should not entertain sanguine hopes that this judgment will be reversed, and the underwriters compelled to pay the whole amount of their respective subscriptions.

BROCKHOLST LIVINGSTON,
of counsel for the plaintiff in error.

The defendants in error insisted that the judgment ought to be affirmed, because,

1. The description of the good *American* ship is equivalent to a warranty of her as *American* property, by the plaintiff in error.

2. Because every warranty in a policy is deemed to be a condition that a certain thing shall be performed, and unless it be performed the contract is void. It is perfectly immaterial with what view the warranty is inserted ; or whether it is inserted with any view at all ; but being once inserted it becomes a binding condition on the assured ; and unless he can show that he has literally fulfilled it, the contract is the same as if it had never existed.

3. Because the sentence of the court of vice-admiralty, condemning the ship and her cargo as *Spanish* property, without assigning any reasons for the condemnation, is conclusive evidence that the ship was not *American* property. Hence it follows that the plaintiff in error has failed in performing his warranty that the ship was *American* property, and consequently the plaintiff in error cannot be entitled to

recover a total loss ; but is only entitled to recover a return of premium.

ROBERT TROUP,
of counsel for the defendants.

ALBANY.
Vandenheuevel
v.
United Insur.
Company.

On the cause being brought on, RADCLIFF and KENT, justices, assigned the reasons of the court, as ante, from page 243 to 267 inclusive.

CLINTON, Senator. The plaintiff having warranted a ship and cargo as *American* property, the question is, whether, in an action against the insurers, the sentence of a foreign court of admiralty, that such warranty was false, is conclusive evidence. It is admitted by the plaintiff, that the sentence binds and changes the property, and that it is *prima facie* evidence of the fact set up against him ; and on the other hand, it is conceded by the defendants, that in several cases, in an action of this kind, the judgment is not definitive in favour of the insurers ; such as when, on the face of it, it is founded on local ordinances, or contrary to the law of nations, or so ambiguous that the court cannot, from the reasons assigned, collect the grounds of it ; and, that this case not coming within either of these descriptions, the contest between the parties still remains open, whether the foreign sentence be *prima facie* or conclusive evidence, against the insured, and whether it bind the property adjudicated only, or is conclusive to every extent, and in every modification of the subject.

Upon a question of such immense importance, either as it respects the interests of commerce, the honour of the nation, the rights of individuals, or the principles of justice, great and mature deliberation is requisite and essential. I know not any cause

ALBANY.
Vandenbeuvel
 v.
United Insur.
Company.

that has ever been discussed in this court, which embraces so many objects, to render the final result important. Attempts have been made, to establish the doctrine of conclusiveness; and, as far as I can comprehend them, they may be arranged under four general heads.

1st. Authorities, previous to the 19th *April*, 1775.

2d. Analogical reasoning from domestic courts.

3d. The nature and meaning of the contract of insurance; and,

4th. National considerations of courtesy, comity, and the like.

The cases quoted, as existing anterior to the revolution, are not only few, but are either ambiguous or not in point.

The most ancient one, reported in 2 *Shower*, of *Hughes v. Cornelius*, was an action of trover, brought for a ship sold under a decree of a *French* admiralty court. The court admitted the sentence to be true, although contrary to the special verdict. They went upon the ground of the decree's changing the property, and of the inconveniences that would result to merchants, if the court should unravel the title of property acquired in this way; and the reason assigned by chief justice *M'Kean*, in a case reported in *Dallas*, seems to be conclusive; the idea that a sentence of a court of admiralty is conclusive, arises from this consideration, that the court always proceeds *in rem*. The decree naturally and necessarily binds the subject of the proceeding. A ship or cargo, or any person purchasing under the decree, will, of course, be secure.

The next case relied upon, is a supposed one of

a *Swedish* ship. It was first mentioned by an anonymous author, in a book entitled "*Theory of Evidence*." It does not appear in any collection of reports; and *Buller*, in referring to his authority for this, mentions in the margin, the case in *Shower*. It therefore appears, that it is confounded with the case of the *Dutch* ship in that author.

ALBANY.
Vandenheuevel
v.
United Insur.
Company.

The case of *Fernandez* and *Da Costa*, was a *Nisi Prius* one, and it expressly states, that the plaintiff only gave a partial evidence of the vessel's being *Portuguese*; and all we can collect from it, is, that the testimony adduced by him was not sufficient to balance that derived from the foreign adjudication. Will it be believed, that upon this slender ground, the mighty fabric of conclusiveness is attempted to be erected? For, independent of decisions since the revolution, which are no authority; of arguments from analogy, which I shall presently notice; and of a few scattered dicta in the books, which do not bear the stamp of judicial authority; there is nothing whereby to warrant the decision of the court below.

The arguments derived from the deference which is paid by the courts of *England* to each others proceedings, do not apply. They are parts of the same building, held together by one common arch. They are under the same government, proceed according to the same law, and redress can be obtained through higher tribunals. If they attempt to exceed their jurisdiction they can be restrained by a superior power, which has an interest in preventing any undue encroachments, and repressing any improper deviations. This is not the case with a foreign court of admiralty. If a neutral conceives himself injured, and is indulged with an appeal, he must still con-

ALBANY.
 Vandenheuevel
 v.
 United Insur.
 Company.

tinue in the courts of the belligerent ; and there is not any uniform law by which these courts govern themselves. They listen more to instructions from the sovereign, than to the injunctions of the law of nations. Lord *Mansfield* admits, that "in every war, the belligerent powers make particular regulations for themselves ; and that no nation is obliged to be bound by them. (*Park*, 360.) It is conceded by the defendants that a foreign sentence is not binding if resting, on the face of it, on such regulations, and yet they declare, that if founded on these, but it does not appear to be so founded, that then it is conclusive.

With respect to the nature of the contract, upon which much has been said, I confess I do not perceive the force of the reasoning, which attempts to fix the loss on the insured.

The contract of insurance, says *Park*, being for the benefit of the insured, and the advancement of trade, must be construed liberally, for the attainment of those ends. We must, therefore, not give it an exposition that would tend to embarrass commerce, or injure the assured ; but adopt such a construction as will most promote the important objects in view. How commerce would be affected, shall hereafter be considered. By the terms of the contract, the assured warrants the property to be neutral, and it is understood to be incumbent on him, so to conduct the vessel, as not to forfeit her neutrality. If the vessel be neutral, in fact, he fulfils his warranty.—He does not warrant that she shall be so in the conception of foreign courts. It is not in the reach of human sagacity, to scan the views which different men may take of the same subject, or the various motives which may produce clashing decisions.—

Against corruption or ignorance in judges, perjury in witnesses, and fraud in captors, it is out of the power of the assured to guard ; they are risks which he casts upon the assurer, and which the assurer undertakes, in consideration of an adequate premium. All the assured is required to do, is not to falsify his warranty. In this case he paid a war-premium of 15 per cent ; and, the foreign sentence out of view, the special verdict has verified his warranty.

ALBANY.
Vandenheuvcl
V.
United Insur.
Company.

With regard to the comity due from one national tribunal to another, it appears to me that the compliment is carried sufficiently far, by considering the sentence as *prima facie* evidence. We are not bound to sacrifice the substantial interests of our citizens to etiquette or courtesy. If a foreign nation will countenance unjust spoliations, if a foreign judge will divide the spoil with the plunderer, are we to countenance the knave and the robber, and declare, with all possible politeness, although we are convinced that an inquiry would paint you in these colours, yet, our respect for your authority will prevail over a regard for justice, or the claims of our citizens ; we shall silence all discussion ; and, although we know you to be both ignorant and corrupt, both oppressive and fraudulent, yet, as you wear the form, without attending to the obligations of a court of justice, we shall treat your decisions with all imaginable courtesy, comity, deference, politeness, and respect.

This is a summary of the doctrine, stripped of the imposing garb which it has assumed, and it can only be a question, whether it is most deserving of ridicule, or detestation.

ALBANY.
 ~~~~~  
 Vandenhoevel  
 v.  
 United Insur.  
 Company.

In suits, brought in *England*, upon foreign judgments, between the same parties, the courts consider them only as *prima facie* evidence of the demand, and admit the defendant on a plea of *nil debet*, to contest the merits of the original cause of action.— If a foreign judgment be not considered conclusive between the same parties, in cases of this nature, why of a foreign court of admiralty between third persons? The constitution of the *United States* provides, that “full faith and credit shall be given in each state, to the public acts, records, and judicial proceedings, of every other state.” And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings, shall be proved, and the effect thereof. Is it conceivable, that if the sentence of courts of disconnected nations are to be held in such high veneration, by each other, that the framers of the constitution could have thought it necessary to make this provision for sister states, in the closest bond of political connexion.— The *British* have made the interests of commerce a primary object of their cares. In the discovery and arrangement of wise plans, and the execution of efficacious measures, for the attainment of this important end, they stand unrivalled in the history of mankind. Their fleets now traverse every clime, and visit every sea, laden with the riches of the world; they bear in their hands the trident of the ocean. In the time of war, they enrich themselves with the plunder of neutrals; their courts appear every where, and condemnations are conducted, not according to the law of nations, or the rights of parties, but according to the instructions from the sovereign

and the rapacity of the captors. "Much less," says *Wooddeson*, "ought any of our courts to slight a foreign sentence. Unless we give credit to their proceedings, we cannot expect the judgments here, should be thought to merit from them any reverence or attention." Here, then, is an explicit avowal that the doctrine is adopted with a view to a return. But *France*, having a different policy, has adopted a different system.\* It is to be further considered, that *Great-Britain* is more than one-half her time at war; that she is an underwriting nation, and, therefore, highly interested in maintaining the rule laid down. Our policy is entirely different. Peace is no less our interest than our duty. Our courts are not liable to executive instructions, and, consequently, must go by the principles of justice; not according to the exigencies of the state. In establishing, therefore, a rule for our government, on this momentous subject, *argumenta ab inconvenienti*, ought to have great weight. *France* and *England* have set us the example; and, as the law of nations is, at least, doubtful, we are at liberty to adopt such a construction, as shall most subserve the solid interests of this growing country. We ought, also, to consider, that the object of insurance is indemnity; that instead of fixing the loss upon one, it divides it among many; that with a pacific nation like ours, an exposition that will release the insurer from war-risks, will be a deprivation of all the benefits that can arise from a neutral position, and will expose us to most of the calamities without any of the advantages derivable from a belligerent state.

Even *Great-Britain*, situated as she is, has found inconvenience, in many respects, from the generality

ALBANY.  
*Vandenheuvel*  
 v.  
*United Insur.*  
*Company.*

\* *Emerigon*,  
 457, 464, and  
 admitted in the  
 argument of  
 Judge *Rad-*  
*cliff*.

ALBANY.  
 Vandenheuvel  
 v.  
 United Insur.  
 Company.

of the rule she has adopted. Her courts have, by recent decisions, attempted to narrow it into a smaller compass. Several important exceptions have been sanctioned, and whenever a different course of policy shall be deemed advisable, the whole system will be destroyed. Our court has, unadvisedly, and in the first instance, without hearing argument, taken that direction, and with the best intentions, has persevered in a doctrine, which would inevitably lead to the spoliation of our citizens, and the destruction of our commerce.

There is nothing, either in the constitution of the admiralty courts of European nations, or the mode of proceeding in them, which entitle them to respect. They adopt the rules of the civil law. The Judges hold their offices during pleasure, and follow the instructions of the ministry. The captors, who are interested, are admitted as witnesses, and the Judges are paid in proportion to the condemnations. They are generally composed of needy adventurers; their great aim is plunder, and their primary incentive, avarice.

I have thus, in a cursory manner, glanced at the principal grounds of reasoning in the cause, and I must own, that I feel most deeply impressed with its importance. The effects of the decisions of this day, will be felt when we are no more; and I trust, that it will receive the approving voice of our consciences, and of our country.

GOLD, Senator.—The questions that arise in this cause for the consideration of the court, are:

1st. Does the warrant in the terms of the *good American ship, the Astrea*, import, in judgment of law, *American or neutral property*?

2d. Is the sentence of the vice-admiralty of Gibraltar *conclusive*, and does it *repel the verification of warranty here?*

ALBANY.  
  
 Vandenneuvel  
 v.  
 United Insur.  
 Company.

On the first preliminary question, however loose and indefinite men are in conversation upon subjects of this nature, yet when the *occasion* is considered, the bearing of the *property of the ship* on the professed object of the contract ; its materiality to the risk, and consequent propriety of an understanding on the point ; the court must, I apprehend, consider Mr. *Vandenneuvel* as explaining himself on the question of property, and under the terms *American ship*, warranting it *neutral*.

Such, in my apprehension, is the plain, fair and rational import of the language used by the assured on this occasion.

On the second question in the cause, involving the legal effect of the sentences of foreign admiralities, I enter with much diffidence, and all the solicitude which its extensive operation upon the fortunes of our fellow-citizens, and the jurisprudence of our country, inspires. If our law is settled on this point ; if the question is bound by authority, then law must have its course, however unpleasant the consequences, however opposed to the speculation of the most enlightened statesmen.

For authority on the question, adjudged cases in that country from whence our jurisprudence is derived antecedently to our revolution, must be resorted to.

The necessary effect of the sentences of foreign admiralities *in rem*, in changing the property in the subject matter in case of condemnation, is readily

ALBANY.  
 Vandenheuevel  
 v.  
 United Insur.  
 Company.

evinced both in point of reason and authority. To this the case of *Hughes v. Cornelius*, 2 Shower, 232, strengthened by some other cases, bears strong testimony ; in this the jurisdiction of all admiralties, and the peace of all civilized nations, are essentially concerned.

But the reason for extending those sentences beyond the attainments of the above objects, to controul the stipulations of parties in a policy of insurance are not equally cogent ; the necessity not equally apparent.

For authority to support this application of admiralty sentences is cited, *Buller's N. P.* 244, *Theory of Evidence*, 37, and the case of *Fernandez v. Da Costa, Park*, 177. In the two first books the rule to the above extent is laid down in nearly the same words, in plain and unequivocal terms ; but no case is cited in the *Theory of Evidence*, in support of the doctrine, and in *Buller*, the case relied on is that of *Hughes v. Cornelius* ; which, although containing observations of the court of a very general and unqualified nature, yet, in the point adjudged, does not warrant the rule as there laid down.

The case of *Fernandez v. Da Costa* is apposite to the question before the court, and merits all that respect which is due to a *N. P.* decision of one of the greatest judges that ever sat in *Westminster hall*. The name of judge *Buller* must be considered also as adding some authority to the rule by him laid down, though supported by no adjudged case there cited.

No adjudications at bar, no elaborate discussions appear to have taken place on the question. On this foundation, in point of authority, stands the doctrine



contended for by the defendants in error; and we are now called upon to say, whether the question is so bound down by authority as to be deemed at rest, and to repel a consideration of its merits.

ALBANY.  
 Vandenheuevel  
 v.  
 United Insur.  
 Company.

After much reflection on the point, in every view I have been able to place it, I am not satisfied that the law on the subject was settled at the period of our revolution. In pursuing the history of law principles, in retracing adjudications, and collecting cases upon questions long agitated in courts, we find early cases often overruled; first opinions disregarded and reversed, and important questions finally settled in opposition to greater authority of precedent, than what is to be found on the question before the court.

Such is the result presented by a perusal of *English* reporters.

But general principles are resorted to in support of the definitive effect of admiralty sentences, and domestic judgments are adduced for illustration.

In the principles of sovereignty, in the superior integrity and responsibility of domestic judges, their exemption from the influence of policy, from the dominion of passions hostile to the administration of justice, too often excited in belligerent nations, in the prevalence of the salutary maxim of municipal origin, "*ut sit finis litium*" will be found reasons, I apprehend, for superior confidence in domestic tribunals.

The case of *Walker v. Witter*, Doug. 5, is strong to show the difference between domestic and foreign judgments; the incontrollable verity predicated of the former, is withheld from the latter, which are there holden to be *examinable*. Nor is the effect

ALBANY.  
 Vandenheuevel  
 v.  
 United Insur.  
 Company.

of this authority repelled by the argument, that a court resorted to, to carry into effect a foreign judgment, ought to be satisfied of its justice ; the application is for *justice* and not *favour*, and the court thus resorted to is bound by constitutional principles, not to delay that justice ; besides, the same principle will apply to the case before the court.

The case of *Gage v. Bulkley*, in *Ridgway*, and *Burrows v. Jemimo*, in *Strange*, are not considered as bearing on the question ; they resting on a different principle, that of the "*Lex loci contractus*." The qualified manner in which admiralty sentences are now received in *England* ; their different operation as to the *fact* and the *law*, serve to mark a wide distinction between those sentences and domestic judgments.

If the reasons assigned for an admiralty decision, do not, when tested by the law of nations, bear out the conclusion, the sentence is rejected ; if the reasons are assigned in an obscure and unintelligible manner as to the *point decided*, the result is the same ; but if the judge should have no reasons, or, by casualty, omit to put them on the record, then the sentence becomes conclusive, and repels all examination.

Why a sentence founded on *error*, as to *facts*, should be more conclusive than one founded on *error in law*, is difficult to conceive. That the mode of admiralty trial, is more favourable to the investigation of truth, than that provided by our common law, is not, I apprehend, evinced by experience, nor do the opinions of some very eminent writers, warrant any such conclusion.

To sentences standing on such grounds, my mind is not yet reconciled to yield that controuling effect, now contended for. Nothing short of the law being made out in the clearest and most satisfactory manner, can, in my apprehension, justify the reception of those sentences, upon the broad ground, now urged upon the court.

ALBANY.  
Vandenheuvel  
v.  
United Insur.  
Company.

There is another ground, remaining to be considered, on which it is with some difficulty I have been able to form an opinion.

The position of the insurer is, *that the assured, on entering into the policy, well knows the tribunal of the captors to be the prize-forum* ; that a consideration of neutrality is essential to the determination ; and, therefore, by the terms of his contract, assents to this test of his warranty. If the law, giving a conclusive effect to admiralty sentences, is to be deemed settled, then would the above conclusion correctly follow ; then would the assured be presumed to know *that law*, and to assent by his contract to all its consequences : but, upon any other ground, he may with equal reason be presumed to assent to a limited operation of these sentences as *prima facie*, or presumptive evidence, reserving to himself a right, and taking upon himself the burthen of disproving the same, and verifying his warranty. Such must be the conclusion of the assured in *France*.

A mind conscious of the truth of the representation in the policy, would with difficulty be carried to the conclusion, that although the property insured be, in fact, neutral, yet if condemned it must from thence be deemed enemy's. Where the property, in fact, is neutral, and in such case only, will the above opi-

ALBANY.

Newkerk

v.

Willett.

nion operate, it is not to be presumed, that the assured calculates on the event of a condemnation. In the various cases of loss by any of the perils insured against, the falsification of the warranty, is equally fatal to a recovery by the assured, though no foreign admiralty may have passed upon the question.

Such are the grounds on which my opinion on this important question, is formed. I will only add, that it is with no small diffidence, I submit an opinion for the reversal of the judgment of a court, possessing, in so eminent degree, the high respect and confidence of the community.

Judgment of reversal.

Charles Newkerk, and Geertruyd his wife, Executrix of Peter Schuyler, deceased, Appellants, *against* Edward S. Willett, Respondent.

A bill for a discovery and injunction to stay proceedings at law, must state some particular matter which the complainant has a right to seek a discovery of, as material to his defence, and without which, he cannot proceed to trial. A mere inquiry because the grounds of the suit at law are unknown, cannot be maintained, being a fishing bill.

ON the 18th day of April, 1799, the appellants filed a bill in chancery setting forth that the testator died in the winter 1792, and left the appellant, *Geertruyd Newkerk*, his widow and executrix. That soon after the respondent demanded a considerable sum of money, which she refused to pay ; that the respondent thereupon offered to submit the controversy to arbitrament, which she also refused ; that thereupon the respondent in April 1793, and after the intermarriage of the appellant *Geertruyd* with the appellant *Charles Newkerk*, commenced a suit against them, in the supreme court, for 1,000*l.* for monies pretended to be due to him from said *Schuyler*— that the appellants did not, of their own knowledge, know any thing of the said demand ; but had strong grounds to believe the

ALBANY.

Newkirk

v.  
Willett.

same to be unjust, because the respondent had not, during the life of said *Schuyler*, taken measures to adjust his claim, and because he did not possess any vouchers to establish the justice of his demand; that the relations and accounts given by the respondent were inconsistent and various, and that the appellants being unacquainted with the origin of the pretended debt, could not, without a discovery by the respondent of all the facts, safely proceed to a trial of the said suit. And that the respondent might, until he should have fully answered to the said facts and interrogatories, stated in the said bill, be enjoined from proceeding to a trial at law in the said suit, the appellants prayed an injunction, which was issued of course, on the usual affidavit.

Fourteen days previous to the filing the above bill, viz. on the 4th day of *April*, 1799, the said appellants had filed a bill against the respondent (in substance the same as the second bill) to which the respondent had put in his answer before the second bill was filed; by which answer the respondent states, that in the year 1786 or 1787, he was possessed of certificates or public securities, amounting to 800*l*. and upwards, besides interest, which he, at the solicitation of the said *Schuyler*, delivered to him, on his promise to lay them out for the respondent's use in the purchase of forfeited lands; that he had several times applied to the said *Schuyler*, in his life-time but without success, to render an account and come to a settlement for said certificates, and that on the last of those applications to the said *Schuyler*, at *Johnstown*, he declared that he had sent the said certificates to *New-York* with his wife, the above appellant, to be disposed of, and that on her return, he would pay the respondent for the same.

P p

ALBANY.

Newkerk

v.  
Will ett.

The bill first filed, to which the answer was put in on the 14th day of *December*, 1799, was ordered by the chancellor to be dismissed.

On the 4th day of *January*, 1800, the chancellor, after hearing the arguments of counsel for both parties, ordered the injunction issued on the second bill, to be dissolved.

On the above hearing, to dissolve the injunction, the chancellor admitted the first bill, and the answer thereto, to be read ; and also an agreement entered into in the suit, in the supreme court by *Willett against* the appellants, in which they consented and agreed " that the rule of reference be discharged ; that the cause be tried by a struck jury ; that the affidavits of *Teunis Van Wageningen*, *John Roorbach* and *Gerrit Staats*, jun. be admitted and read as evidence ; that no writ of error shall be brought by the defendants merely for the purpose of delay ; nor shall any bill in chancery be brought or filed.

The case now came up on an appeal from the chancellor's order dissolving the injunction.

KENT, J. This is an appeal from an interlocutory order of the court of chancery, dissolving an injunction, without any answer being put in to the bill.

The two most material points, which were raised at the argument, upon this appeal, were these :

1st. Is an order dissolving an injunction, one of the orders of the court below, upon which an appeal will lie ?

2d. Did the bill contain sufficient equity to entitle the appellants to a discovery, and consequently to an injunction, to stay proceedings at law, in the mean time ?

ALBANY.

Newkirk

v.  
Willett.

To discover the first question with accuracy and satisfaction ; to draw the line between that class of orders, arising in the progress of a cause, which are susceptible of review by appeal, and that class of orders, which are not susceptible, (and such a distinction may, and does exist) would require more examination, than I have had time to bestow, or than the late period of the session of this court, would conveniently permit : I shall, therefore, give no opinion on the first point ; nor is it necessary in the present instance, to the rights of the parties, because, admitting an appeal to lie upon the order, I am of opinion, on the second question, that the injunction was properly dissolved.

The bill does not state sufficient equity, to entitle the appellants to a discovery. It states generally, that the respondent had made a *demand* upon one of the appellants, as executrix of *Peter Schuyler*, deceased, and that as he did not produce any voucher, she had refused to pay him. It states further, that he proposed an arbitration, which she refused, and that finally, he had *brought a suit* against the appellants, in the supreme court. The bill states further, that the appellants know nothing of the demand *of their own knowledge*, but that they believe it unjust, because the respondent took no measures to liquidate and settle it, in the life-time of *Peter Schuyler*, and does not now produce any vouchers, and has been inconsistent, in what he has from time to time said, as to the nature and extent of his demand.

This is the substance of the bill ; it amounts to this, the respondent has sued us at law, and we do not know for what, and therefore, we ask for a dis-

ALBANY.

Newkirk

v.

Willett.

\* 2 Ves. 445.  
492. 2 Fonb.  
484. 1 Vern.  
399.

covery beforehand, although we have reason to conclude, he has sued us upon some groundless pretence.\* Such a bill shows no *equity*, no *right* to a discovery. It sets forth no *matter material*, to a *defence* at law, and which cannot be proven, unless by the *confession* of the opposite party. It is, to use Lord Chancellor *Hardwicke's* expression, a mere *fishing bill*, seeking generally, a discovery of the grounds of the respondent's demand, without stating any right, to entitle them to it; such a bill may be exhibited by any executor or administrator, and indeed by any defendant, who is not already in possession of the plaintiff's proofs. But the court of chancery, has wisely refused to sustain bills for discovery in such latitude, and unless the party calling for a discovery, will state some *matter of fact material* to his *defence*, or which he wishes to substitute by the confession of the defendant, the court will not enforce a discovery.

I am accordingly of opinion, the appellants in the present case, were not entitled to a discovery, and that the injunction staying the suit at law, was properly dissolved, and that the order for that purpose, be affirmed. And further, that the appellants pay to the respondent, his costs of the appeal to be taxed.

Judgment of affirmance unanimously.



(SUPREME COURT.)

ALBANY.

Jackson  
v.  
Bull.

James Jackson, *ex dem.* the new loan officers of *Rensselaer* county, and John Crabb, *against* Isaac Bull.

THIS case was stated thus: *John Crabb*, one of the lessors, purchased of the new loan officers, at public auction, on the 3d *Tuesday* in *September*, 1795, one hundred and sixty acres of land. On the 31st *October*, and 4th *November*, following, he sold, by deed of bargain and sale, one hundred and forty acres, parcel, &c. to *Abraham Francisco*, under whom the defendant claims; and on the 5th *January*, 1796, he obtained his deed from the loan officers, in pursuance of his former sale, and now brings his ejectment on the latter deed, to recover the whole one hundred and sixty acres.

Question. Is he entitled to recover?

*Per Curiam*, delivered by KENT, J. I incline to the opinion that no legal estate, except a mere tenancy at will, vested in *Crabb*, until the loan officers had executed the deed. The statute of frauds prevents any greater estate from vesting without writing, and it is, besides, a general rule of law, that a corporation cannot sell land without deed; and the loan officers, in the present instance, are ordered by the act,\* to convey the land they sell at auction, by deed, under the loan office seal.

But I adopt, as a just rule of construction, and applicable to the present case, the principle laid down by this court, in the case of *Raymond v. Jackson, ex dem. June*,\* "that whenever it is intended to be shown, that nothing passed by a grant, by reason that at the

A sale by loan officers, at auction, is within the statute of frauds. If a bargain for the purchase of land be concluded, and at the expiration of some time, the conveyances duly executed, the subsequent deeds will so far have relation to the day of concluding the bargain, that an intermediate sale by the vendee will begood against him and his privies, and the possession of the original vendor, at the time of such second sale, cannot be urged as a possession adverse to the vendee, and that, therefore, nothing passed by his deed.

\* 14th March, 1792.

\* Jan. Term, 1798.

ALBANY.

Jackson  
v.  
Bull.

time, there was a possession in another, adverse to the grantor, then the time to which the grant is to relate, is the time when the bargain for the sale was finally concluded between the parties; and that, consequently, any intermediate adverse possession, before the execution of the conveyance (which is the only technical consummation or evidence of the grant) can never affect it." In the present case, therefore, the deed to *Crabb*, of the 5th *January*, 1796, shall have relation back to the third *Tuesday* of *September*, 1795, being the time of the final conclusion of the bargain, by the sale and purchase, at public vendue, so as to render valid any intermediate sale or disposition of the land, by *Crabb*. Even supposing the deed of the 5th *January*, 1796, could not have this retrospective force by relation to the time of the conclusion of the sale and purchase at the vendue, still *Crabb* can never be permitted to claim in opposition to his deeds of the 31st *October*, and 4th *November*, 1795, by alleging, that he had no estate in the premises. For if a man make a lease by indenture of land which is not his, or levy a fine of an estate not vested, and he afterwards purchases the land, he shall, notwithstanding, be bound by his deed, and not be permitted to aver he had nothing. Whether a person can, in such case, be said technically to be estopped, because it is of the nature of an estoppel, to bind privies as well as parties; and *Coke* gives an instance, wherein an act of this kind, without warranty, will bind the grantor and not his heir; and whether a deed can operate at all by way of estoppel, if any interest passes by it, are points on which I forbear to give an opinion, because they are

*Era. c. 110. Co. Litt. 45 a. 47 b. 352 a. b. 4. Co. 53 a. 2 Mod. 115. 6 Mod. 258. 1 Salk. 276. 2 Ld. Raymond, 3551. 3 P. W. 373.*

*Co. Litt. 247 b. 265 b. 339 a. Litt. sec. 637.*

*Co. Litt. 45 a. 47 b. 8 Co. 53 3. 3 P. W. 373.*

not only something difficult, but not necessary to be discussed.

ALBANY.

Johnson

v.

Bloodgood.

In the present case, there can be no doubt, but that *Crabb* himself, shall never claim against his own deed.

I am of opinion, therefore, that judgment be rendered for the plaintiff, for the twenty acres only.

Judgment for the plaintiff.

(SUPREME COURT.)

Johnson against Bloodgood.

— *M-John. case 51, 1724*  
THIS was an application to set aside a verdict, rendered for the plaintiff.

From the judges report, the present appeared to be an action brought for the benefit of the creditors of the plaintiff, and his name, used merely to satisfy the forms of law.

The point to be decided was this; whether, in a suit brought by the assignees of an insolvent debtor, in his name, but for the general benefit of his creditors, the defendant shall be permitted, under the plea of payment, to set off a note of the insolvent, purchased *after* it became due, and after the assignment of the insolvent, though without actual notice of it, at the rate of 12s. in the pound, and for the purpose of such set-off.

KENT, J. This suit is substantially, between the creditors of *Johnson* and the defendant. It is now well understood, that courts of law will take notice of assignments and trusts, and consider who are beneficially interested, and will protect the *cestui que trust*.\*

When a note is purchased after due, every presumption is to be made against the purchaser. Therefore, if he state it to have been generally in such a year, and the maker has assigned his property under the insolvent law, on the 16th *January*, in that year, it shall be presumed, the purchase was after the assignment. A note purchased after due, and after an assignment under the insolvent law, cannot, in an action by the assignees, in the name of the insolvent, be set off against a debt due to the insolvent's estate.

\* 1 D. & E. 620.

ALBANY.

Johnson

v.

Bloodgood.

\* 1 *Ld. Raym.*  
573.† 3 *Durnf.* 80,  
83.

In giving my opinion, I mean not to question the law that a bill or note may be negotiated after it is due,\* and be declared upon as such. But I approve and adopt, as salutary, and calculated to prevent fraud, the doctrine laid down in the cases of *Brown and Davis*,† and *Taylor and Mather*, that if a bill or note be indorsed after it becomes due, it throws a suspicion on the transaction, and the indorsee shall take it, subject to all the equity that existed in favour of the maker of the note, before it was indorsed; and if there be any attendant circumstances of fraud, the indorsee shall have every presumption turned against him. So in the present case, the defendant, stating only generally the year 1793, in which he purchased the note, it shall be presumed he purchased it after the 16th *January*, 1793, the date of the assignment of the insolvent's estate.

When a note is offered for sale, after it has become due, and at a discount, what is the necessary inference? most certainly that the maker is insolvent; and, if so, his effects and credits ought immediately to enure to the benefit of his creditors, and he be regarded but as their trustee.

The presumption will be, because, so, indeed, justice would dictate, that the insolvent makes forthwith, a full and frank disclosure and assignment of all his property, for the payment of his debts. And if the insolvent do, in fact, make such an assignment, the purchaser in such a case, of a note, after the assignment at a depreciated rate, for the purpose of a set-off, though he may not, in fact, know of the assignment, is nevertheless properly chargeable with having acted under the presumption of notice of the

assignment. The law infers the notice, being what is termed *constructive notice*. 2 *Fonb.* 155. He accordingly commits a fraud upon the creditors; he does an act *mala fide*, and, as lord *Kenyon* observed, in a case not very unlike the present, "it would be most unjust, indeed, if one person who happens to be indebted to another, at the time of the bankruptcy of the latter, were permitted, by an *intrigue* between himself and a third person, so to change his own situation, as to diminish or totally destroy the debt due to the bankrupt, by an act *ex post facto*."\*

ALBANY.

Betts

v.

Turner.

\* 6 *Durnf.* 39.

I accordingly continue in the opinion that was given at the trial, that the note purchased by the defendant was inadmissible testimony, under his plea of payment, and that the defendant take nothing by his motion.

Motion denied.

(SUPREME COURT.)

Betts against Turner.

THIS was an action of covenant, and the declaration stated in substance, that *John Baker*, on the 17th *October*, 1795, gave a promissory note to *William Hooker*, by which he promised to pay to him, or his order, on the 1st day of *April*, 1797, 833 dollars and 33 cents; that the defendant sold the note to the plaintiff, to be by him collected at his own risk and costs, as it respected the ability of *Baker* and *Hooker*, and that the defendant covenanted to and with the plaintiff, to pay him 2,000 dollars when required, "in case the plaintiff should take all and

On the sale of a note not negotiable, with a covenant by the vendor, to pay the vendee a certain sum, "if the vendee should take all and every legal step the law directs, to prosecute to effect, the maker and payee, to wit, if the vendee, and no one in his name, or in that of the maker, could recover judgment legally, against the maker on the note, or against the payee, in case he had, at the date of the covenant, or should, previous to the suit against the maker, discharge the note;" if, in an action against the maker, the payee, according to the laws of the country, go into court and deny authorising the suit by the assignee against the maker, the assignee cannot maintain an action on the covenant against the vendor, if by the law of the country the payee be, in such case, liable for the amount, without first showing a legal endeavour, by suit, to recover the amount against the payee. Covenants are to be construed, not merely by their letter, but their spirit.

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ALBANY.

Betts

v.

Turner.

every legal step as the law directed, to prosecute to effect, *Baker* and *Hooker*; to wit, if the plaintiff, and no one in his name, or in *Hooker's* name, could recover judgment legally against *Baker*, on the note, or against *Hooker*, in case he had, at the date of the covenant, or should, previous to the suit against *Baker*, discharge the note."

The declaration further stated, that *Baker* resided in *Massachusetts*, and that on the 31st *July*, 1797, the plaintiff sued *Baker* in *Hooker's* name, according to the laws of *Massachusetts*; that *Hooker* came into court, and denying that he had ever authorised the suit, the court dismissed it. That the plaintiff had taken all legal steps to sue *Baker* upon the note, and that he could not sue upon it in his own name, either *Baker* or *Hooker*. That *Hooker* had never negotiated the note, so as that any person could sue upon it in his name, but himself; and that *Hooker* had never discharged the note.

To this declaration the defendant pleaded, that *Baker* and *Hooker* reside in *Massachusetts*, and that the note was sold by *Hooker* to one *Cole*, and by him to one *Booth*, and by *Booth* to the defendant, who sold it to the plaintiff; that such notes were not negotiable by the laws of *Massachusetts*, so as to enable the assignee to sue in his own name, but that he could sue in the name of the original payee, and that if the payee released the suit or discharged the note, he became liable to the holder, for the amount of such note, of which law the plaintiff, at the time of the delivery of the note, had notice; and that the plaintiff did not prosecute *Hooker*, nor attempt to recover a judgment against him on the note, as he might and ought to have done, according to the laws of *Massachusetts*.

To this plea there was a general demurrer and joinder.

*Per Curiam*, delivered by KENT, J. By the covenant, it appears, that the plaintiff was to do a previous act, to entitle him to maintain a suit on the covenant. This previous act, like all other stipulations in covenants, must be done fairly and faithfully, according to the spirit and intention of the agreement. It may be proper to observe, as a rule in the construction of covenants, that they are to be performed according to their spirit rather than their letter, "*ut res magis valeat quam pereat.*"

The beneficial end that the parties had in view, is to be primarily regarded and enforced; and, therefore, where an obligee engaged to deliver up his obligation to the obligor, by such a day, and he, in the mean time, put it in suit, recovered upon it, and then delivered it; this, although a compliance with the words of the agreement, was held no performance of the intent.\* So, where A. covenanted with B. that

ALBANY.  
Betts  
v.  
Turner.

he should enjoy a term of six years, discharged from tithes, and a suit was brought, *after* the expiration of the term, for the intermediate tithes, it was held, that B. was as much prejudiced by a suit after the term, as he would have been before, and that the intent of the covenant was, that he should be freed from suit and payment; the covenant, therefore, broken.† By the same just and liberal rule of interpretation, it is declared, that if one covenant to deliver the grains made in a brew-house, and in the mean time, he mix them with hops, so as to render them unpalatable to cattle; or engage to deliver so many yards of cloth, and he cut it in pieces, and then deliver it; or if he covenant to leave the timber on the land, at the expiration of a lease, and he

\* Cro. E. 7.

† Cro. E. 916.

ALBANY.

Betts  
v.  
Turner.

\*T. Raym. 464.

† See 1 Sid. 48.  
151.

cut it down and so leave it,\* these, and other numerous instances of the like kind, to be met with in the books,† are all alleged to be breaches of the covenant; because, the law regards not a *literal* but a *real* and *faithful* performance of contracts, according to the *intent* of the parties.

These principles ought to be kept steadily in view, as having an application to the present case.

It is pretty obvious, that the defendant did not intend to pay the 2,000 dollars, until the plaintiff had faithfully tried, and tried in vain, to recover the amount of the note from *Baker*, and from *Hooker*. The note was sold to the plaintiff, to collect at *his own risk*, so far as respected the ability of *Baker* and *Hooker*; and it was a condition precedent to the payment of the money by the defendant, that the plaintiff should take all and every legal step, as the law directed, to prosecute to effect, *Baker* and *Hooker*. He did take those steps to prosecute *Baker*, but not to prosecute *Hooker*, although the latter became liable to him, for releasing the suit he had instituted in his name, against *Baker*.

Here, then, appears a palpable failure on the part of the plaintiff, of an act which was necessary to entitle him to his suit against the defendant; I mean the failure of taking the steps by law directed, to prosecute to effect, *Hooker* as well as *Baker*.

It may, however, be objected, that the case in which *Hooker* is to be prosecuted, is afterwards particularly stated in the covenant, and that *Hooker* was only to be prosecuted, if he had, at the date of the covenant, or should, previous to the suit against *Baker*, discharge the note; and, that, never having



discharged the note, the plaintiff was under no necessity, by the covenant, of prosecuting *him*. To this, I answer, that, although this be the *letter*, it cannot be the *intent* of the agreement. The agreement, in the first instance, provides generally, that the plaintiff shall prosecute to effect, both *Hooker* and *Baker*, and it then proceeds to specify the instance, in which *Hooker* is to be prosecuted; to wit, if he had then already, or should, previous to a suit against *Baker*, discharge the note. But the rational meaning of the covenant, deficient as it may be in perspicuity and precision, cannot be otherwise than this, that the plaintiff should first prosecute *Baker*; and, if *Hooker* should prevent him from recovery against *Baker*, that he should then prosecute *Hooker*.

ALBANY.

Betts

v.

Turner.

The defendant seems to have contemplated but a *single* case, in which *Hooker* could prevent a recovery, and that case, which was the discharge of the note, he has specified; whereas, an interference in *Hooker*, by discharging or releasing the suit, was an equal impediment to a recovery, and equally exposed *Hooker* to a prosecution.

The plaintiff was to take every legal step to obtain a recovery, both against *Baker* and *Hooker*, but he omitted to take any step against *Hooker*, and now alleges, as his sufficient excuse, that *Hooker* did not prevent a recovery against *Baker* in the manner mentioned and expressly provided for in the covenant.— It is true, he prevented a recovery by discharging the *suit*; but he did not prevent a recovery by discharging the *note*, and he must prevent the recovery

ALBANY.

Betts

v.

Turner.

in the latter mode, and not in the former : otherwise he was not to be prosecuted.

I dislike any such subtle distinction, calculated, as it appears to me, to elude the end and design of the covenant ; for I cannot conceive any possible inducement, on the part of the defendant, to stipulate, that the plaintiff should previously prosecute *Hooker*, if he prevented a recovery against *Baker*, by discharging the note, which would not equally be felt, and equally operate, if *Hooker* prevented a recovery against *Baker*, by discharging the suit. And for the plaintiff to pretend, that he was bound to prosecute *Hooker*, in the one case, because it was expressly mentioned in the covenant, and not bound in the other case, because it happened to be omitted, although precisely within the same reason, is for him to construe the article by its *letter*, and to disregard its *spirit*. It is, in allusion to the cases mentioned, to deliver up the obligation by the day, but in the mean time, to prosecute and recover upon it. It is to deliver the cloth, but after it is cut to pieces. It is to leave the timber on the land, but to leave it prostrate.

I am, accordingly, of opinion, that the plaintiff has not shown, in his declaration, the requisite previous performance on his part, and that judgment ought to be rendered for the defendant.

Judgment for the defendant.

ALBANY.

Frost  
v.  
Carter.

Frost *against* Carter.

FROM the circumstances stated in this case, it appeared, that the defendant, on the 3d day of *January*, 1792, gave the plaintiff a promissory note for 9,299 dollars and 44 cts. payable in 90 days; that the plaintiff indorsed the note, and it went into circulation; that it was not paid when due; that the defendant was afterwards discharged under the insolvent act, and, at the time of the discharge, the note belonged to *Archibald Mercer*; that subsequent to the discharge, to wit, on the 1st *July*, 1794, the plaintiff paid 3,000 dollars, took up the note, and brought this suit to recover that money back from the defendant.

If the indorser of a note pay it after the discharge of the insolvent maker, under the insolvent law, the discharge is no bar to a subsequent recovery against the maker.

The question upon these facts, was, whether the debt, now claimed of the defendant, was a debt which the plaintiff could have asserted as his own, and have verified upon oath, as a specific and certain debt on the 2d day of *March*, 1793, when the defendant procured his discharge? In other words, was it a debt proveable against the estate of the insolvent?

*Per Curiam*, delivered by KENT, J. The act of insolvency, of the 21st *March*, 1788, in pursuance of which, the defendant obtained the discharge which he now sets up, in bar of the plaintiff's right of action, extends the discharge to such debts, and to such debts only, as are due at the time of the assignment of the insolvent's estate, and to debts contracted for before that time, though payable afterwards.—Those debts must be specific, and certain sums of money, to which the creditor can make oath, as be-

**ALBANY.**

Frost

v.

Carter.

ing justly due, or to become due at some specified time. Unless the creditor, *at the time of the assignment*, be able to produce and verify such debt, in such manner, he would not be entitled to receive from the assignees, his dividend of the insolvent's effects, nor would he be barred from his future action against the insolvent.

Therefore, although the plaintiff in the present suit was, as I take for granted, on non-payment of the note by the defendant, duly fixed as indorsor, and although this was prior to the defendant's discharge, yet, until he had actually paid the holder of the note, and taken it up, he could not be said to have a certain and ascertained debt due to him from the defendant. His demand upon the defendant depended upon the defendant's final non-payment of the note, and his payment of it, for him. He stood, in respect to the defendant, in the relation of a *surety* only; and what portion of the note, if any, short of the whole sum, the defendant himself might be able to pay to the holder, was a matter altogether uncertain. So that the plaintiff, until he paid the 3,000 dollars, and took up the note, had not any specific and certain debt due to him from the defendant, and as, therefore, this debt, which is now demanded, accrued subsequent to the defendant's discharge, and, in consequence of an actual payment by the plaintiff, the plaintiff was not entitled to claim his debt from the assignees of the defendant, and, consequently, the discharge of the defendant cannot be a bar to a recovery in the present suit.

This construction of the operation of our insolvent act, is the same with that of the *English* bankrupt law *in consimili casu*.

ALBANY.  
Carter  
v.  
Frost.

The stat. 4 and 5 Ann. c. 17, which was continued by the stat. of 5 G. II. c. 30, sec. 7, extends the discharge of the bankrupt to *all debts* by him *due or owing* at the time he became a bankrupt, and the stat. of 7 G. I. c. 31, extends it to debts contracted before the bankruptcy, though payable after. These statutes in this respect are to the same effect and almost precisely in the same words with our act of insolvency when it declares the force and extent of the insolvent's discharge.

By the *English* decisions upon those statutes, it has been frequently determined, and seems to be a rule permanently settled, that if the creditor, at the time of the bankruptcy, had not a certain debt due, to which he could attest by oath, and which he could bring in under the commission of bankruptcy, he is not barred by the bankrupt's discharge; and, in like manner, that a *surety*, although he be liable *before*, yet if he does not actually *pay* the debt till after the act of bankruptcy be committed, he then cannot prove it under the commission, and may resort to the bankrupt.

3 Wils. 14. 269.  
276. 347. 530.  
6 Durnf. 489.  
1 H. Black. 640.

3 Wils. 347.  
Comp. 526.  
Durnf. 599.

It has been objected, and with some plausibility, to this doctrine, that if a *debt* be due at the time of the assignment to any one who might have proved it, it must be done away by the discharge; for, that the insolvent is discharged from all his *then debts* to whomsoever they may belong, and that, if when discharged from the action of one creditor, he were to remain li-

ALBANY.

Jackson

v.

Rogers.

\* Cowp. 525.

† 1 H. Black.  
640.

able at the suit of another for the same debt, it would be no discharge at all. These objections were raised and overruled in the cases of *Taylor v. Mills and Magnall*,\* and of *Brooks v. Rogers*.† The answer appears to me to be plain and sufficient, that where a plaintiff cannot prove a debt till he has actually paid the money, and the payment be of the proper debt of the insolvent, and after the assignment of his estate, the cause of action in such case arises *after* the insolvency, although upon a *pre-existing ground*, and as he cannot exhibit his debt to the assignees, because there was no sum due, to which he could attest when the assignment was made, it is highly, nay *indispensably* just, that he should resort to the insolvent himself.

I am accordingly of opinion that judgment be rendered for the plaintiff.

Judgment for the plaintiff.

(SUPREME COURT.)

Jackson *ex dem.* Jane Van Alen, *against* Rogers.

A parol gift of lands creates only a tenancy at will. If the donee lease, and the donor do not ratify his act, the mere permitting the lessee to build and enjoy under the term, will not prevent the donor from legally devising the land, and his devisee may recover without notice to quit.

THIS was an action of ejectment for a store and lot at *Kinderhook*, on a demise laid 1st *June*, 1795. The application was to set aside a verdict for the plaintiff, and grant a new trial.—The facts of the case were these.

*Lawrens J. Van Alen* was in possession of the premises for a period of more than 30 years before the bringing of the present suit. *John C. Holland* married his daughter, and was a drunken dissipated character, frequently requesting *Lawrens* for a deed of the premises, and was as often refused; at last, he, *Lawrens*, said to him, and but once, "well *John*,

you may take the kraal (meaning the premises) and I will deduct 60*l.* from your wife's portion;" no writings were signed, and these expressions were before building the store in question.

ALBANY.

Jackson

v...

Rogers.

*Holland* afterwards leased the premises to *McMechen* for 9 years, and *McMechen*, in consideration, was to build a store on them; he did so, and at the time he began to build, *Lawrens* had grain on the premises. *Lawrens* was at first dissatisfied when he heard *Holland* had made the lease, but afterwards was *satisfied*, saying it would benefit *Holland's* children. The lease was made in the year 1785. In *August*, 1794, *Holland* (the first lease being out) made a second lease to *McMechen* (the partner of the defendant) for 5 years, at the annual rent of 30*l.* *Lawrens* heard of the second lease from strangers, and was *dissatisfied* with it, particularly when he found the rent was not to benefit *Holland's* children. He frequently talked of taking the property into his own hands, and afterwards devised *the lands* to the lessor of the plaintiff for life, by will dated 19th *June*, 1790. *Lawrens* died in *May*, 1795; the action was brought without any notice to quit.

The question on these facts submitted to the court was, ought the lessor of the plaintiff to recover?

*Per Curiam, delivered*, by KENT, J. In the argument for a new trial in this cause on behalf of the defendant, it was contended that the lessor of the plaintiff ought not to recover:

1st. Because the lease from *Holland* to *McMechen* amounted to a disseisin of *Lawrens J. Van Alen*, and destroyed his capacity to devise.

2d. That the second lease from *Holland* to *McMechen*, was still subsisting at the commencement of the suit, and was a lawful impediment to the plaintiff's recovery.

## ALBANY.

Jackson  
v.  
Rogers.

1 Burr. 79. 1  
Salk. 246.

3d. That the defendant was at all events to be deemed a tenant from year to year, and so entitled to six months *notice* to quit.

1 Burr. 110.  
Sanders on Uses,  
240.

Sanders on  
Uses, 240, 241,  
242. Butler's  
Co Lit. 330 b. n.  
285. Harg. Co.  
Lit. 57 a. n.  
379.

Palm. 205. Cro.  
5. 659. 1 Burr.  
112. 113. Coup.  
693.

1 Burr. 111.

1 Burr. 60.

1st. To constitute an actual disseisin, or one *in fact*, there must be a tortious entry and an actual expulsion. No such thing appears, or was pretended in the present case, nor was there a disseisin admitted by *election*. The distinction of a disseisin by election, as contra-distinguished from disseisin in fact, was taken for the *benefit of the owner* of the lands, to extend to him the easy and desirable remedy of assize, instead of the more tedious remedy of a writ of entry. Whenever an act is done, which immediately, and of itself, creates an *actual disseisin*, it is still taken to be an actual disseisin, notwithstanding the introduction of the doctrines of disseisin by election; as, if a tenant for years, or at will, should enfeoff in fee; and on the other hand, those acts which are susceptible of being made *disseisins by election*, are in fact no disseisins till the election *makes them so*; as if a tenant at will, instead of making a feoffment in fee, should only make a lease for years.

No such election was ever made in the present case, and consequently there was no disseisin. Making a devise has been deemed, in a similar case, an intimation of an election, not to be disseised; and if *Holland* was tenant at will (and no greater interest can be inferred in him, because no greater interest can be created *by parol*) a lease for years by him can be no disseisin, unless the true owner elect to make it so, nor does it destroy his capacity to devise.

These are briefly the settled distinctions between disseisins in fact, and disseisin by election. They were generally hinted at or brought into view, com-



ALBANY.

Jackson  
v.  
Rogers.

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mented upon and explained in the case of *Atkins and Horde*, one of the most learned and elaborate judicial discussions on a question of real property to be met with in modern times, and they are likewise historically and ingeniously illustrated by *J. W. Butler*, in one of the notes to his edition of *Coke upon Littleton*.

I shall therefore pass the whole of this doctrine *by*, as having no influence on the present case, nor should I have noticed it at all, had not the counsel for the defendant, appeared to rely much upon it, and to consider it as strong ground in the cause.

2d. In respect to the existence and force of the second lease from *Holland* to *McMeechen*. I would observe, that notwithstanding the gift of the premises to *Holland* by *Lawrens*, he had never any greater interest in them than an estate *at will*, because *Lawrens*, to whom the premises belonged, never alienated them to him by deed *or writing*, nor made any parol demise of the same for a *term* not exceeding *three* years, and reserving a *rent* thereon. *Holland* was, consequently, by the force and effect of the statute of frauds, but a tenant *at will*, when he made the first lease to *McMeechen*; and when he made the second lease, he was still but a tenant at will, and so had no *authority* to make either lease, because such authority resides, not in a tenant at will; nor can a parol gift of land in fee operate as an *authority* to make leases, because the statute of frauds declares expressly what shall be the operation of such parol grant; it shall "have the force and effect of leases or estates at will only, and shall not have any other, or greater force or effect." I therefore do not regard any intimation that may be given by the circumstances of the *subse-*

## ALBANY.

Jackson

v.

Rogers.

1 Durnf. 94.  
 Comp. 482.  
 Doug. 50. 7  
 Durnf. 85. Cro.  
 E. 156.

quent *assent*, either tacit or express, of *Lawrens*, to either the first or second lease; because it is a settled doctrine that no *subsequent assent* will make good a *void* lease, although subsequent acts may operate as a new grant. Both the leases to *McMeechen* were, therefore, from the beginning, null and *void*, because made by a tenant *at will* who has no capacity to *grant*.

3d. The third point is, whether the defendant was entitled to *notice* to quit.

2 Black. Rep.  
 1173.

Where the holding is not for a determinate period but from the reservation of an annual rent, or from other circumstances, is susceptible of being construed into a holding from *year to year*; in such cases the courts have adopted as a rule favorable to the interests of both *landlord and tenant*, that neither party shall determine the lease without six months previous notice to the other, of that intention; but where the lease is for a definite period, or determinable on a certain event, no notice is requisite, as both parties are apprised of the termination. So if the tenant be *strictly* a *mere tenant at will*, as where one enters under a *void* lease; there, I apprehend, no notice is necessary. The *N. P.* decision in the case of *Goodtitle* ex dem. *Adeare*, v. *Prentice*, before *Gould*, J. in 1790, is expressly to this point.

Esp. Dig. 466.

Cro. E. 830. 2  
 Co. 55 b. 1  
 Wils. 176.

In the present instance the defendant, the partner of *McMeechen*, entered under a *void* lease, and became a *mere trespasser*, if *Lawrens* chose to make him so, and so continued to the bringing of the suit; no subsequent *agreement* was made, no actual *rent* was *stipulated* for between him and *Lawrens*, none was *demanded* or *paid*. *Lawrens* did nothing to recognise

him as *his tenant*, and to create between him the relation of *landlord and tenant*, and consequently no notice was necessary.

I am accordingly of opinion that the defendant take nothing by his motion.

Judgment for the plaintiff.

(SUPREME COURT.)

The People *against* The Sessions of Chenango.

This was an application for a *mandamus*, forbidding the Sessions of *Chenango* from proceeding on a new trial they had granted.

*Per Curiam*, delivered by KENT, J. Let the *mandamus* go. The sessions cannot grant a new trial upon the merits. It is a power *not exercised* by this court, after verdict in cases of *felony*, and perhaps it is expedient it should not be.— This court had by its original constitution by ordinance, the superintending controul of all inferior jurisdictions within the state, and this power has never been taken away. It has been from time to time recognised by law, and in constant and vigilant exercise. All courts within the several counties, have, from the first foundation of our judicial system, been regarded by law and by practice as inferior courts; they can be compelled to duty by a *mandamus*; they can be restrained from usurpation by *prohibition*.\* The causes and pleas before them, can be arrested and removed by *habeas corpus* or *certiorari*, and their judges can be *attached*, brought before this court, and punished for disobedience. All these are distinguished and essential marks of supremacy in the one court, and of inferiority in the

ALBANY.

The People

v.  
The Sessions  
of Chenango.

The Sessions cannot grant a new trial on the merits; if they do, a *mandamus* will go forbidding them to proceed.

\* *Prohibition* are *ex debito justicie*, when an inferior court acts without jurisdiction. They will lie to courts-martial. See the case of *Grant*, 2 H. Black. 69.

ALBANY.  
 The People  
 v.  
 The Sessions  
 of Chenango.

other ; they are, therefore, within the reason and meaning of the law, *inferior* courts, and such courts are not intrusted *by law*, with the power of setting aside verdicts of juries upon *the merits*. It has been the uniformly received usage and understanding on the subject, until very lately, that that power was exclusively confided to this court ; it can neither be taken from this court, nor assumed by the sessions without express words.

There are strong reasons for the law withholding the power from the courts of general sessions of the peace. All the justices of the peace, within the county, are judges of the court. This renders it a very numerous tribunal, and divides and weakens the responsibility of the members. The justices are laymen, and cannot be supposed to have been taught or trained in the science of law. The power of awarding new trials on the merits, is a power necessarily resting in sound legal discretion. The reasons of the exercise of that discretion, are not stated on the record, and are not susceptible of review by this court. The power may be grossly abused ; different principles and contradictory practice may be assumed in different courts ; verdicts may be set aside, *ad infinitum*, till juries are worried into submission ; they might be set aside where the prisoner is acquitted, as well as convicted, and the power thus unlimited and unreviewed, might go to the destruction of trial by jury ; to overturn the rights of the citizen ; to shake the stability of government, and destroy all system and harmony in our jurisprudence.

I am, with perfect satisfaction, of the opinion, that this great and transcendant *trust*, rests *solely* with this court ; a court which the constitution and law,

has taken care so to organize, as to contemplate it *fit and competent*; for the due and safe exercise of this very delicate power. We cannot alienate any part of our *trust*; we are responsible for its safe-keeping, and that no *waste* be committed on a power we hold for the security of our citizens, in their liberties and estate.

ALBANY.

Lodge  
v.  
Phelps.

(SUPREME COURT.)

Lodge *against* Phelps.

THE question in this case was, can the assignee of a promissory note given in *Connecticut* maintain a suit upon it here *in his own name*, since he is not permitted to do so there?

*Per Curiam*, delivered by KENT, J. That personal contracts, just in themselves, and lawful by the law of the land where made, are to be fully enforced according to the intent of them, notwithstanding any change of habitation by the parties, is a principle of justice and of social policy which ought every where to be received and supported. But the admission of the *lex loci contractus* can have reference only to the nature and construction of the contract, and not to the *mode* of enforcing it; for every country must and will have precedents and judicial forms peculiar to itself, and under the solemnity of these forms will enforce contracts according to their true intent and spirit.

The note on which the present suit was brought, was made payable to the payee or *his order*, and he ordered the money to be paid to the plaintiff; the plaintiff, therefore, by the rules of equity, not only in *Connecticut*, but in every country where equity is known,

An action is maintainable in our courts on a promissory note within our statute by the holder, though made in *Connecticut*, where the suit must be in the name of the original payee.

2 *Erek.* 473.  
474. 1 *Bro. P.*  
C. 41. 1 *Black.*  
*Rep.* 237. 238.  
258. 7 *Durnf.*  
243.

2 *Erek.* 475. 1  
*Bos. & Pul.*  
142.

ALBANY.

Covenhoven  
v.  
Seamen and  
others.

is entitled to receive the money in preference to the original payee. What just reason can there then be, that the plaintiff should not be permitted to avail himself here of the forms and remedies prescribed by our laws, and to sue *directly in his own name* for the money, but should rather be compelled, agreeably to the usage of *Connecticut*, to use the name of the original payee as a mere nominal plaintiff, or *dramatis persona*? If the defendant has any defence authorised by the law of *Connecticut*, let him show it, and he will be heard in the one form of action as well as in the other. Agreeably to the principle I have laid down, I am for allowing him every defence that he would have been entitled to make in *Connecticut*, had the note been sued there in the name of the original payee, and as long as this can be done, I do not perceive any sufficient reason for turning the plaintiff round to another suit. To permit innovations upon our forms of action, when not necessary, may lead to inconvenience.

Judgment for the plaintiff.

(SUPREME COURT.)

Covenhoven *against* Seaman and others.

If a recognisance in a *homine replegiando* be, that the slave claimed, should prove his liberty, and personally appear in court and prosecute his suit with effect, it is forfeited by the appearance and surrender of the slave to the person claiming, notwithstanding he be on such surrender accepted.

THIS was an action of debt on recognisance, in which the defendants bound themselves to the plaintiff in 100*l.* that a certain *Jacob Jones*, whom the plaintiff claimed and detained as his slave, and who had sued out his writ of *homine replegiando*, should *prove his liberty* in the most proper and expedient way and means, and should *personally appear in this court*, and his suit in that behalf *prosecute with effect*.

The plaintiff averred in his declaration, "that the said *Jacob* did not prove his liberty, nor prosecute his

suit in that behalf with effect, but *suffered judgment as in case of nonsuit*, to be entered against him for not proceeding to trial."

ALBANY.  
Covenhoven  
v.  
Seaman and  
others.

The defendants by their plea stated, "that after the said judgment of nonsuit, the said *Jacob did appear* in this court, and then on the prayer of the plaintiff *surrendered himself* to him, who accordingly *accepted* him, and that the defendants have since *paid to the plaintiff his costs of suit*." To this plea there was a general demurrer and joinder.

*Per Curiam*, delivered by KENT J. The defendants by this recognisance, and which appears to have been taken agreeably to precedent, undertook for three things.

1st. That *Jacob Jones* should *prove his liberty* in the most expedient way.

2d. That he should personally appear in this court.

3d. That he should prosecute his suit in that behalf *with effect*.

Instead of this it appears that *Jacob Jones* has not proven his liberty, nor prosecuted his suit with effect, but has suffered judgment to be entered against him as in the case of nonsuit, and has, at the prayer of the plaintiff, surrendered himself to him.

The condition of this recognisance has certainly not been complied with; a party submitting to a *nonsuit*, does not prosecute a suit to effect; \* nor if the writ be *abated* for any cause, will it save the recognisance, unless another writ be sued out with due diligence; the case given in *Fitzherbert*† is closely analogous to the present. "In a *homine replegiando*, the plaintiff was bound in a recognisance in a certain sum of money to the defendant's use that he would sue him,

\* Carth. 519.

† N. B. 68. a.

ALBANY.

Judah

v.

Randal.

*cum effectu* ; and if the writ be abated for any cause yet he ought to sue another writ for that taking, &c. otherwise he shall forfeit his recognisance. H. 8. H. 4.

The only question that can be raised in this cause, is whether the surrender to the plaintiff is a discharge from the recognisance. I find no authority, nor any reason to think so ; there were good inducements for the stipulations in the recognisance that a suit should be prosecuted to effect, and the question of the freedom or servitude of *Jacob Jones* judicially determined. It would either silence the unjust pretensions of the plaintiff, and for ever deliver the man from bondage, or it would quiet him in the lawful possession of his property. The surrender of *Jones* to the plaintiff, and his acceptance of him, leaves the question still undetermined.

I am, therefore, of opinion, that the plea is bad and that judgment be rendered for the plaintiff.

Judgment for the plaintiff.

(SUPREME COURT.)

*Judah against Randal.*

Under a policy on a chariot, "free from average," but in which jet-tisons make one of the perils insured against, if the box of the chariot be thrown overboard in a storm, it is a total loss, and the insured entitled, on abandoning, to recover as such, though the carriage be on deck.

THIS was an action on a policy of insurance in the usual form, but free from average, on a chariot to be carried on deck.

On the voyage the box was thrown overboard in a storm to lighten the vessel ; she afterwards arrived safe with the remaining parts of the chariot.

It appeared the box is ordinarily estimated at two-thirds of the price of the whole chariot. Verdict for the plaintiff, as for a *total* loss of the chariot, subject to the opinion of the court on the following question :



"Whether there hath been such a loss as to make the insurer liable? if so the verdict to stand; if not, to be set aside, and the defendant to take judgment as in case of nonsuit."

ALBANY.

Judah  
v.  
Randal.

*Per Curiam*, delivered by BENSON, J. The very statement of the question implies it to be admitted by the parties, and which is certainly the case, that the only question between them is, whether the loss is to be deemed a *total* loss, or only a *partial* or *average* loss of the chariot? By the express terms of the policy, jettison was one of the perils which the insurer took upon himself; but at the same time the insurance being also expressly *free of average*, the jettison must not be a *partial* or *average* loss only, but must amount to a *total* loss of the *thing* insured, so that the inquiry (and which is impliedly admitted in the question submitted to the court as stated between the parties) is, had the plaintiff a right to abandon to the defendant the remaining parts of the chariot which were saved, and sue as for a *total* loss? My opinion is, that he had.

The part lost exceeded more than half the value of the *whole* chariot, the *thing* insured. The box being lost, the chariot cannot, with any propriety, be considered so to have arrived *in specie* as that it required to be *repaired* only to have again become a *whole* chariot. With respect to a chariot and every other wheel-carriage having a box, the seats for the persons to be conveyed, wheels, the perch with the axle-trees, springs and other parts affixed to it, and the pole or shafts are sometimes *collectively* denominated the *carriage-part*, as distinguished from the *box* and *its* immediate fixtures. If a wheel, or any other part of the *carriage-part* should be lost, or be so

**ALBANY.** injured, as to be wholly unserviceable, and therefore  
 Cuyler and ors. a *new* part become necessary in the place of the part  
 v. so lost or injured, the chariot would be said to be  
 Bradt and ors. *repaired* only, but if the box should be lost, or be so  
 injured, it could not, with propriety, be said that the  
 chariot was *repaired* by a *new* box, it would be con-  
 sidered as a *new* chariot, but that the *old carriage*  
*part* was made to serve. The case of a vessel, put  
 by the plaintiff's counsel, is perfectly analogous and  
 just. There may, as between *insured* and *insurer*,  
 be a *total* loss of the vessel, although *all* the spars,  
 sails and rigging may be saved. A new hull may be  
 built and designedly of a form and burthen so as to  
 be adapted to the spars, sails and rigging saved with-  
 out any alteration in them, and be fitted out with them  
 accordingly. This would not restore the identity of  
 the *vessel lost*; as by the loss of the *hull* the vessel is  
 lost; so by the loss of the *box* the chariot ceased to  
 exist in specie.

Judgment for the plaintiff.

(COURT OF ERRORS.)

Cuyler and others, Appellants, *against* Bradt and  
 others, Respondents.

THE appellant's bill in the court of *Chancery* set  
 forth:

Where several  
 patentees bear,  
 in equal pro-  
 portions, the  
 expense of ob-  
 taining a pa-  
 tent, and by  
 the recital of  
 deeds among  
 themselves,

it appears they intended to purchase in common, they will be taken as  
 tenants in common and not as joint-tenants, though the patent be to them jointly. A  
 conveyance with a recital of the intent of a purchase, is a conveyance with notice, and  
 the grantee takes, subject to trusts implied as well as expressed.

1st. A patent of the 2d June, 1688, to *Van Renssel-  
 aer, Van Cortlandt, Van Ness, and G. T. Van Vech-  
 ten* for the land called *Hosick*; and,

That no tenancy *in common* being expressed, the  
 estate at law was of course in *joint-tenancy*.

2d. The will of *G. T. Van Vechten* of the 12th *March*, 1703-4, devising his *farm*, &c. and all his residuary *real estate*, to his sons, *Johannes* and *Volchert*, as *tenants in common*, in *equal parts*. ALBANY.  
Cuyler and ors.  
v.  
Bradt and ors.

3d. The deaths of *Van Rensselaer* and *G. T. Van Vechten*, before severance of the *joint-tenancy*.

4th. A conveyance afterwards of the 18th *October*, 1706, from *Van Ness* and *Van Cortlandt*, the surviving patentees, to *Johannes*, as the son of *G. T. Van Vechten*, which, after reciting the patent, further recites that the lands were purchased from the *Indians*, and the patent obtained at the joint and *equal* expense of the patentees; that it was their true intent, purpose, and meaning, that they should hold as *tenants in common*, without any advantage by reason of joint-tenancy or survivorship. That by the death of *G. T. Van Vechten* and *Van Rensselaer*, before partition or any act to destroy or cut off the right of survivorship by reason of the joint-tenancy, according to such true intent, purpose and meaning, *Van Ness* and *Van Cortlandt*, as survivors, were, by such means, in the eye of the law, become sole proprietors; that they having regard to the premises, and for a *nominal* consideration in money, conveyed to *Johannes*, an equal undivided fourth part of the lands.

5th. A conveyance from *Johannes*, of the 30th *October*, 1741, to *Bradt*, *Brees* and *Van Beuren*, his *sons-in-law*, reciting a partition of part of the lands among the proprietors, on the 20th *November*, 1732, when lots No. 2, 10, 11, 18, 20 and 21, fell to the share of *Johannes*, and lot No. 7 fell to the share of *J. Van Rensselaer*, and conveying to them, in consideration of *thirty* pounds, all such right, estate, title, interest and demand, whatsoever, as he had, or ought

ALBANY. to have, in those lots, and the undivided land ; and  
 Cuyler and ors. that this conveyance was either *voluntary*, or if for  
 Bradt and ors. <sup>t.</sup> *valuable* consideration, then *with notice of the right*  
 or claim of *Volchert*.

6th. A deduction of the title of the appellants as the representatives of *Volahert* ; and,

7th. That the respondents hold as volunteers under *Bradt* and *Brees*.

The scope of the bill then was, that the appellants might be let in for a moiety of the lands held by the respondents by title derived from *Bradt* and *Brees*, and to have an account of the rents and profits.

To this bill the respondents demurred, and the demurrer being allowed, there was a decree of dismissal, but the decree being reversed on appeal, and the cause remanded to the court of *Chancery*, the respondents put in their answer, and proofs were taken.

The only *material* question as to facts contested between the parties was, whether there was sufficient evidence to find that the conveyance from *Johannes* to *Bradt*, *Brees* and *Van Beuren*, was either *voluntary*, or if it was for valuable consideration, then that it was with notice of the right of *Volchert*.

The *proofs* as to these *facts*, were :

1st. A partition-deed of the farm of *G. T. Van Vechten*, between *Johannes* and *Volchert*, of the 9th of *June*, 1707, reciting the *will* of their *father*.

2d. A mortgage from *Johannes* to *Coyeman*, of the 2d *September*, 1723, reciting the deed from *Volchert* for the parcels, which, on the partition, fell to the share of *Johannes*, and which then constituted his *farm*.

3d. A conveyance from *Van Beuren* to *J. Van Rensselaer* of the 22d *May*, 1749, reciting a convey-

ance from *Johannes* to *Brees*, *Bradt* and *Van Beuren*, of the 12th *August*, 1738, for all his *farm*.

ALBANY.  
Cuyler and ora.  
v.  
Bradt and ora.

4th. That on the 2d *June*, 1740, *Brees*, *Bradt*, and *Van Beuren* paid 8*l.* 0*s.* 2*d.* for *Johannes* to one *Fresneau*.

5th. That on the 22d *July*, 1744-5, *Bradt*, *Brees* and *Van Beuren* became bound with him to one *Dow* for 52*l.* 8*s.* 0*d.* and that they also became bound with him to one *Staats* in about 300*l.* but the time is not mentioned.

6th. That *Van Beuren*, in 1748, sold his share of the lands under the conveyance from *Johannes*, of the 30th *October*, 1741, to one *Collins*, for 20*l.*

7th. The deposition of *Bleeker*, examined as a witness. He testified that he drew the deed from *Johannes* to *Bradt*, *Brees* and *Van Beuren*, of the 30th *October*, 1741; that previous to the execution of it, he showed it to *Volchert*, who directed his son to go to the witness and tell *Johannes* not to execute it; that the son told *Johannes* he was directed by his father to desire him not to execute it; that *Johannes* immediately, thereupon, left the room, and after an absence of about fifteen minutes, returned and said, what shall I sign? I have already signed to *Dow* and *Jansen*; that *Bradt*, *Brees* and *Van Beuren* were present, and *Brees* told him that he did not sign away any more than he had, and then *Johannes* signed it.

On the hearing, on the bill, answer and proofs, the chancellor again decreed the bill to be dismissed, and thus assigned his reasons.

Mr. *President*. I dismissed the appellant's bill,

1. Because the crown, having granted to the patentees jointly, no intention of the patentees to hold

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**ALBANY.** in common can vary the nature of the estate, either  
*Coyler and ocs.* at law or equity, from that created according to the  
*Bradt and ocs.* intent of the crown, expressed in the grant.

There is no intent that it should be otherwise expressed in the grant. The estate was in *joint-tenancy*. Their intention to hold as tenants in common, the estate which passed to them by the grant, cannot sever the estate that was in joint-tenancy.

2. Because the patentees paid equal proportions of the purchase-money to the Indians. This always makes a joint-tenancy in equity, where the estate is joint in law. The reason of this is founded on what is laid down in some of the books; namely, that it seems to be the doctrine of the court of equity, that where two or more purchase land, and advance the money in *equal* proportions, and take a conveyance to them and their heirs, this is a joint-tenancy; that is, a purchase of them jointly, of the chance of survivorship, which may happen to one as well as the other; but where the proportions of the money are not equal, and this appears in the deed itself, this makes them in the nature of partners; and, however the legal estate may survive, yet the survivor shall be considered but as trustee for the others, in proportion to the sums advanced by each of them.

It has already been intimated, that the patentees' having contributed equally in the *expense* of acquiring the land, was sufficient for the implication of a compact or trust between them, that no advantage was to be taken by survivorship, and, consequently, that the fitness of the rule here cited, might be questioned.

This is not only altogether a refinement, but it is also evidently erroneous; because, in order to equality

in chance of survivorship, there ought to be equality of age, as much as equality of contribution: to this may be added, that the correctness of a court of equity would require, that the presumption that persons ever act on a calculation of chance or luck, ought to be considered as rather odious, and, therefore, never to be assumed as a ground of decision.

ALBANY:  
Cuyler and ora.  
v.  
Bradt and son.

3. Because, if the supposed trust is founded on any agreement between the original patentees, their heirs should have been parties to the suit, since they might, probably, have been called to show, that the conveyance to the eldest son, was conformable to the very terms of the agreement.

4. Because the legal estate being in the defendants, and no express trust appearing, the complainants should show such an implied trust is as clearly out of the statute of frauds.

5. Because the present defendants are *bona fide* purchasers, without notice of the claim of the complainants, *Bleeker's* testimony being inconclusive, as to the point of notice, particularly after so great a lapse of time, and the death of all the parties.

6. Because, there being no evidence of fraud, or of the commencement of a suit by *Volchert Van Vechten*, as set forth in the bill, and on which alone the court of appeals overruled the demurrer, and the estate having been held, for upwards of eighty years, by the purchasers under *Johannes*, without any suit or legal demand upon them; the court will not, after such a lapse of time, suffer them to be dispossessed by an implied trust, particularly as the estate has, probably, with many others in this coun-

**ALBANY.** try, increased one hundred fold by the improvements thereon within that period.

**Cuyler and ora.**  
**Bradt and ora.**

*Per Curiam*, delivered by **BENSON, J.** As to the question of fact above stated, it is not requisite to say more, than that the evidence at least preponderates in favour of the supposition, that the conveyance of the 30th October, 1741, although there might have been some pecuniary confederation for it, as from *Brees*, *Bradt* and *Van Beuren*, yet, that the greater inducement or consideration as from *Johannes*, was relationship. This rendered it more a gift than a sale. It appears, that *Brees*, *Bradt* and *Van Beuren* then knew of the will of *G. T. Van Vechten*, and of the conveyance from the surviving patentees to *Johannes*, so that the conveyance from *Johannes* to *Bradt*, *Brees* and *Van Beuren*, was not only voluntary, but they took with a notice of the right of *Volchert*, and either the one or the other is sufficient for the appellants.

Although the evidence is mentioned as preponderating only, the inference is not, therefore, intended to be, that if it was necessary, it could not be shown to be perfectly satisfactory.

As to the question of law, or right between the parties, it is to be observed, that a use is a right in one person, to have the use or profits or beneficial interest of land, and another person to have the right; that is, to be the legal, or formal possessor or tenant of it. These uses were borrowed from the civil law, and introduced at first by the clergy, to evade the statutes of mortmain by procuring a natural person to hold the land, but to the use of the corporate or politic persons, the monastery, or religious house. This



contrivance was afterwards used as a means to enable persons to devise, and also to prevent forfeitures by *cestui que use*.

ALBANY.  
Cayler and ora.  
v.  
Bradt and ors.

The land itself could not be devised, but the use might ; the land was forfeitable for crimes, but the use was not ; the only remedy for *cestui que use*, the person having the right to the use, against his feoffee to use, the person holding the land, if he refused to let him have the use of the land, was in a court of equity. Afterwards, the statute of uses, by annexing the possession to the uses, gave the *cestui que use* a complete remedy at law. This produced a distinction between executed and executory uses, the former being where the possession is by force of the statute, transferred to the *cestui que use*, so that the feoffee to the use is only, as it were, to forbear or be passive, and the use will execute itself in the *cestui que use* ; the latter is where an act is necessary by the feoffee to the use, to execute the use, as to convey over the land, or to receive and pay over the profits, &c. and since the statute, executory uses have been more generally distinguished by the appellation of trusts, which hath produced different appellations for the parties ; the feoffee to the use, is called the trustee ; the *cestui que use* is called the *cestui que trust*. The execution of trusts can be still compelled in equity only, and are there subject to the like rules, with uses at law ; they are assignable ; they are transmissible by descent and devise, and, which is peculiarly to be attended to in the present case, the possession of the trustee is the possession of the *cestui que trust*, and the rights of the latter may be barred by the statute of limitations, in like manner as

**ALBANY.** uses or titles at law. But trusts are implied or expressed; implied trusts are such as arise from the case, which is, therefore, the fact, and the trust is the right arising from that fact; express trusts not being to be deduced from the case itself, must be declared. No particular form, however, is requisite in declaring them, and they may be declared at any time.—Before the statute of frauds and perjuries, the evidence of the declaration might have been by *parol*; it must now be by writing. Purchasers for a valuable consideration, from a trustee, do not purchase at their peril against the trust, and, therefore, they will not be adjudged to have purchased, subject to the trust, unless it is proved they had *notice* of it.

Guyler and ora.

Bradt and ora.

To apply what is here premised, to the present case—It might be insisted, that *G. T. Van Vechten* having contributed an equal *fourth* part of the expense in acquiring the land, that fact, therefore, was in itself sufficient to imply an existing trust in favour of him; that he was to have an equal *fourth* part of the land in severalty, and that a court of equity would, accordingly, in case of his death, have compelled the surviving patentee to have conveyed a fourth part to his representatives; by the conveyance, however, from the surviving patentee to *Johannes*, the necessity of recurring to mere implication, for the trust is saved, the recital in that conveyance being a sufficient declaration in evidence, that such trust was expressed between the patentees, and coeval with their intention, to acquire the land; it was their true intent, purpose, and meaning, that they should hold as tenants in common, without any advantage, by reason of joint-tenancy or survivorship.

The trust, therefore, being an interest devisable, a moiety of the fourth of *G. T. Van Vechten* passed by his will to *Volchert*, and the conveyance from the surviving patentees, is to be deemed the act by them in the execution of the trusts; so that *Johannes*, as to a moiety of the lands thereby conveyed to him, took by implication or construction of law, in trust for *Volchert*, and this hath been transmitted to the appellants, his representatives. *Johannes* not having done any act in breach of the trust, or adverse to it, so as to be considered as equivalent to a disseisin at law, until the conveyance of the 30th October, 1741, the possession, therefore, of *Johannes* to that time, being to be deemed the possession of *Volchert*, which being within sixty years, when the appellants filed their bill; and that conveyance being voluntary, or they having notice at the time, of the right of *Volchert*, the appellants are, therefore, entitled to a decree for a moiety of the lands. Laches are, nevertheless, so to be imputed to them, that it would not be proper for a court of equity to aid them to recover the rents or profits.

ALBANY.  
Cuyler and ora  
V.  
Bradt and ora

It will suffice to say, as a general answer, to the reasons not specifically replied to, that it is obviously to be collected, from what has already been suggested, that with respect to the allegation in the bill, of a suit by *Volchert* against *Johannes* for the recovery of the land, it not being proved, no notice was taken of it on the hearing of this appeal, either by the court or the counsel.

**DECREE.**—On hearing counsel on both sides, on the appeal, in this cause, this court doth adjudge and decree, that the decree of the said court of chan-

ALBANY.  
 Cuyler and ors.  
 v.  
 Bradt and ors.

cery in this cause be reversed; and instead thereof, this court doth further adjudge and decree, that the respondents do, by sufficient conveyances, convey to the appellants severally in fee simple, according to their respective shares or interest therein, as they have in their bill of complaint set forth, their title to the same, under *Volchert Van Vechten*, one of the residuary devisees, named in the will of *Garrit T. Van Vechten*, also in the said bill set forth, an equal undivided moiety of such of the lands, conveyed by *Johannes Van Vechten*, the other residuary devisee, named in the said will, to *Bernardus Bradt*, *Hendrick Brees*, and *Barent Van Beuren*, by conveyance, bearing date the 30th day of *October*, 1741, in the said bill mentioned, and held by the said respondents, by title derived from the said *Bernardus Bradt* and *Hendrick Brees*, or either of them, and that the said bill, as far forth as the same prays that the respondents may account for the rents or profits of the said lands, be dismissed. And, except as to the costs intended in the decree of this court on the former appeal between the said parties, that they respectively pay their own costs on this appeal, and which have hitherto accrued in the said court of chancery, and that, as to all such other costs as shall hereafter accrue in the said court of chancery, the respondents pay to the appellants their costs in that behalf to be taxed. And it is ordered that the said cause be remanded to the said court of chancery, and that all necessary orders and directions be there given for carrying this decree into effect.

Decree of reversal.

(SUPREME COURT.)

Jackson *ex dem.* Smith. *against* Hammond.

ALBANY.

Jackson

v.

Hammond.

ISRAEL SMITH, being seised in fee of the premises in question, by his will of the 21st July, 1774, devised them "to the trustees of the town of *Brookhaven*, and their successors for ever, upon trust and confidence, and to the intent and purpose that they did, and should, after his decease, rent and hire the same to any person at their will, and pay the rents and hires thereof, after the expiration of the time, during which the same should be legally charged and incumbered with the lawful maintenance and dower of his wife, into the hands of the regular minister and other ruling officers for the time being of the *Baptist Church of Christ* at——." The testator died on the 1st November, 1780, and his widow about ten years thereafter.

Our statute of 1784, enabling churches, &c. to incorporate themselves, does not enable them to take lands by devise.

The trustees of the *Baptist Church* had, from the death of the widow, received the rents and profits of the premises, and the defendant, at the time of the commencement of the suit, held the premises under them. The lessor of the plaintiff was heir to the testator. The trustees of the town of *Brookhaven* were, at the time of making the will, and then were a corporation capable to take and hold lands. The question was, "is the plaintiff entitled to recover?"

*Per Curiam*, delivered by BENSON, J. By the law of *England*, and which, as such, became the law of the colonies, lands were devisable in virtue only of the statute of *Henry VIII.* commonly known as the *statute of wills*. *Special* customs were exceptions to the common or *general* law; but, being *local*, they formed no part of our law, and the right or

U u

ALBANY.

Jackson

v.

Hammond.

power to devise, granted by the statute, being expressly limited or restricted from extending to a right or power to devise to *corporations*, the devise in the will of *Israel Smith* to the trustees of *Brookhaven*, ought, therefore, to be adjudged void ; so, that on his death the lands descended to the lessor of the plaintiff as his heir at law. This must be admitted, unless, as is contended for on the part of the defendant, by our statute of the 6th *April*, 1784, enabling *churches*, &c. to incorporate themselves, they are *constructively*, with respect to lands possessed or held by them, *at the time of their incorporation*, made capable to take by *devise* ; and that, to that end the incorporation is to *relate* to the death of the testator, so as to overreach the rights of all others claiming under him.

It must be acknowledged, that if the words *devised* and *devise* in the 4th section, had either been wholly omitted, or if in the sentence in which they are found, they had been made *expressly* to refer only to *goods* or *chattels*, there would not then have been a possible ground for a *constructive* capacity in these *corporations* to take and hold *lands* also by devise ; the question, therefore, between the parties may be more precisely stated to be, whether the construction contended for is *necessary*, in order to satisfy these words, or to give them their requisite due sense and meaning, considered as predicates or relatives, and the words *lands*, *tenements*, *hereditaments*, *goods and chattels* considered as subjects or antecedents.

The rule *reddenda sunt singula singulis* is obviously applicable in this case, and by a transposition, equally obvious, the sentence may be made to read “ all temporalities, whether the same consist of lands, tenements, hereditaments, goods or chattels *given* or

ALBANY.

Jackson

v.

Hammond.

*granted*, or of goods or chattels *devised*," &c. where-  
by a perfect, although a less extensive sense and  
meaning, will be given to the word *devised*, and its  
concomitant *devise*, and the sentence will be render-  
ed consistent both with itself and with law, and es-  
pecially with the concluding sentence in the section,  
" that the trustees shall hold the *church* and *lands*  
thereunto belonging, by whatsoever name or person  
the same were purchased or had, or to them given or  
granted, *in as full a manner as if they had been le-  
gally incorporated, and made capable to take, receive,  
purchase, have, hold, use and enjoy the same.*"

The only manner in which, had they been incorpo-  
rated, they were capable of taking, &c. being by *gift*  
or *grant*, and not by *devise*, it is, therefore, not un-  
worthy of notice, that in the latter sentence the word  
*devise* is omitted, and the words, *given or granted*  
only used, to which may be added, that if the con-  
struction contended for by the defendant is to obtain,  
then this consequence will follow, that the legislature  
must be supposed to have intended to give to a  
*church* a capacity to *hold* lands *taken* or acquired as it  
were *before* their incorporation, and refuse to them a  
capacity to *take* and consequently to hold lands ac-  
quired after their incorporation, and without a reason  
for the discrimination ; for, whether the acquisition  
was *before* or *after* the incorporation, or whether it  
was by *gift* or *grant* or by *devise*, was immaterial, as  
long as the value was within the sum limited by the  
statute. As to the argument deduced from the ex-  
pression in the statute, " although such gift, grant or  
*devise* may not have *strictly* been agreeable to the  
*rigid* rules of law," and that the restriction or limita-  
tion in the statute of wills from devising to *corpora-*

ALBANY.

Jackson

v.

Hammond.

tions is to be considered in the nature of a *strict* or *rigid* rule of law, and therefore intended to be dispensed with by these provisional expressions, it would be sufficient to observe, that it is only colourable at best.

I will, however, in answer, state, that if the will in the present instance had, after the possession and incorporation of the *Baptist church*, the *cestui que trust* in it, been discovered to have been attested by only *two* witnesses, the heir at law would be entitled to recover the lands; this I assume, as unnecessary to be demonstrated, and therefore, if the expressions cited were not competent to *cure* a mere *imperfection* in the devise, surely they must be less so wholly to *create* a devise; if they must yield to the rule, and of questionable utility in the statute of frauds, much more must they yield to the rule confessedly highly provident in the statute of wills. I will only add, that supposing the statute of Henry VIII. never to have passed, and that we had not had, as was the fact, any statute of wills of our own, till the present one of 1787, would the incorporating statute now under consideration, in such case have been deemed *impliedly* to *alter* the common law, so far as to give a right to *devise* to a *church*, congregation, or other religious society only? if not, and the statute of Henry VIII. having passed, and with the *express* restriction or limitation already mentioned, should we now, therefore, decide for the defendant, will it not follow from the decision, that terms less explicit and less forcible will suffice for an *implied* enlargement or extension of an *express* restriction or limitation in a grant of a right or power, than for an *implied* right or power, no otherwise to be considered as prohibited, except as



it hath never been *positively* granted? Where shall we find the rule or principle for the difference in this respect in the two cases? My opinion is that the words *devised* and *devise* in the statute, refer only to *goods and chattels*, and that to make them refer also to *lands, tenements, and hereditaments*, would be a construction too extensive to be warranted by law, and consequently that there must be judgment for the plaintiff.

Judgment for the plaintiff accordingly.

(SUPREME COURT.)

Browne and others  
against  
Robinson and Hartshorne.

ALBANY.

Browne and  
others

v.

Robinson and  
Hartshorne.

ON a motion, by the defendant, to set aside the verdict in this cause, Mr. Justice LEWIS, before whom it was tried at the *October* term, 1799, made the following report.

"This was an action of *assumpsit*, for iron sold and delivered by the plaintiffs to the defendants.—Plea, the general issue. At the trial, the plaintiffs produced, as a witness, *Henry B. Franklin*, late a clerk of *Nicholas Cooke*, formerly of the city of *New-York*, merchant, deceased, who proved, that the iron mentioned in the declaration, was consigned by the plaintiffs to *Cooke*, to be sold by him, as their factor. That on or about the 7th day of *November*, 1796, as nearly as the witness could recollect, *Cooke* sold the iron to the defendants for the sum of 1080 dollars, payable at seventy days; but at the time of such sale, no notice was given to the defendants (nor was any evidence offered, to show *York* may, by custom, sell on a credit, at the risk of their principal,

Where goods are sold by a known factor of a house, a set-off cannot be made against them by the purchaser, for a debt due from the factor in his own right, if the goods be actually those of his principal, though the factor do carry on business for himself, and nothing be said at the time of sale respecting the ownership of the goods. On a sale by the known factor of a house, the principal may immediately maintain an action against the vendee. Factors in *New-*

ALBANY.  
 Browne and  
 others  
 v.  
 Robinson and  
 Hartshorne.

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that they knew) that the sale was made by *Cooke*, as factor or agent, for the plaintiffs, or any other persons. He testified, however, that it was *generally known* that *Cooke* was factor to the plaintiffs; but that he then transacted business as well on his own account, as upon commission.

“That after the delivery of the iron, and before the death of *Cooke*, the witness, as his clerk, called upon the defendants with a bill of parcels for the same, and requested their note for the amount, which they refused to give, alleging, that they held a note given to them by *Cooke*, for nearly the same amount, which would fall due about the same time, and that they intended to set it off against the amount of the iron. They at the same time showed the note to the witness.”

“That *Cooke* was, at the time of the sale, and until, and at his death, indebted to the plaintiffs in the sum of 20,000 dollars and upwards. That after his death, and before the expiration of the credit of seventy days, one of the plaintiffs called with the witness, upon the defendants, and informed them that the iron was sold by *Cooke*, as factor of the plaintiffs, and, at the same time, gave notice, that they should expect payment of the same, upon which, one of the defendants answered to the plaintiff, that he did not know him, and would not pay him. It also appeared, that one of the plaintiffs, after the above conversation, became the administrator of *Cooke's* estate. It was also proved, that it is the custom of *New-York* for factors to sell on credit at the risk of the principal, and that it was the uniform usage in *Cooke's* store, to sell agreeably to such custom, and

that in this case, the goods were sold at the plaintiff's risk upon the common commission in such cases. The plaintiffs there rested their cause, and the defendants moved for a nonsuit, upon the ground that no offer of indemnity against the claims of *Cooke*, or his representatives, had been made by the plaintiffs to the defendants, which motion was overruled by the judge.

ALBANY.

Browne and  
others

v.

Robinson and  
Hartshorne.

"On the part of the defendants, evidence was then offered to be produced, that at the time of the sale of the said goods, and notice to pay the plaintiffs, they held *Cooke's* note, dated the 22d July, 1796, for 1080 dollars and 25 cents, payable in six months after the date, and that they had since held, and still did hold it, which note was intended to be offered as a payment. This evidence was objected to by the counsel for the plaintiffs, as inadmissible under the present issue, and that it would be equally so, if a notice had been annexed to the plea. Whereupon the judge rejected that evidence, and directed the jury, that the law was with the plaintiffs, and that the note of *Cooke* could not be set off under this issue. Upon which, the jury found a verdict for the plaintiffs for the price of the iron, with interest, from the expiration of the seventy days credit."

*Per Curiam.* Where goods are purchased from a factor *scienter*, with intent by the purchaser, to set off against the purchase, a demand which he may have against the *factor*, the principal may, in such case, and as on a sale made *immediately* by himself, have a suit against the *purchaser*, at any time before payment to the *factor*, every purchase so made with

ALBANY. intent solely thereby to obtain payment or security  
 Laight & ora. from the factor being, as against the principal, frau-  
 v. Morgan & ora. dulent.

Motion refused.

(COURT OF ERRORS.)

William Laight and others *against* John Morgan  
 and others.

Where a bill seeks an examination of witnesses *de bene esse*, on account of age, &c. an affidavit of the facts on which the application is founded, is necessary. So on a bill to have a title established, and for quiet possession; for whenever a bill seeks to transfer a matter cognisable by law to chancery, an affidavit of the facts, on which it is required, should be stated. When a bill requires an affidavit to some parts, and not to others, a demurrer to the whole for want of that affidavit is bad.

THE substance and points of this case are so well stated in the decision of the court, that it is unnecessary to do more than give the opinion on which it was pronounced.

KENT, J. The bill of complaint in the cause, appears to have had three objects, viz.

To obtain a discovery of facts from the defendants; to perpetuate testimony; and to obtain specific relief.

Upon the demurrer to the whole bill, there were seven causes of demurrer assigned. The three last causes were assigned in the same words, as in the similar case of *Le Roy and others v. Service and others*, which was before the court the last year, and by the decision then, are to be deemed as having been overruled. The fourth cause of demurrer, was abandoned by the counsel for the respondents upon the argument as untenable. If the third cause be not equally so, it is, perhaps, not material in the present case, since, as I shall presently show, the decision of this cause finally depends upon this single point, viz. if *any part* of the bill requires an answer, is a demurrer to the *whole* bill good?

I confine myself, therefore, to the consideration of these two questions, as arising out of the two first causes of demurrer.

1. To what objects, if any, in the bill, was an affidavit requisite.

ALBANY.

Laight and ora.

2. If not for every object, is a demurrer to the whole bill, for the want of such affidavit, maintainable ?

V.  
Morgan & ora.

1. The bill alleges the loss of papers material to the complainants' title, and seeks a discovery concerning them from the defendants. This is a matter within the ordinary and proper jurisdiction of a court of equity, and so far it is conceded that the bill did not require an affidavit. The bill further seeks for the examination *de bene esse* of witnesses, who are alleged to be aged or infirm, or resident abroad, and for this purpose, I conceive that an affidavit was requisite, by the practice of the court, stating generally, the age, infirmity, and place of residence of the witnesses, and as no affidavit of this kind was put in during any stage of the cause, a demurrer to that part of the bill, might have been good. The bill finally prays to have the title of the complainants to two tracts of land established, and quiet possession given to them. This is a matter properly of legal jurisdiction, and relievable by the courts of common law ; and, for this reason, I deem an affidavit to the truth of the material facts stated in the bill, to have been requisite.

It appears to me to be an established, as well as a reasonable and fit rule, that whenever a bill seeks to transfer to chancery, a question properly cognisable by the courts of law, the facts rendering such transfer proper, must be verified by oath ; so that a suitor shall not, upon mere suggestion or pretext, break in

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ALBANY.  
Laight and ors.  
 v.  
Morgan & ors.

upon and disturb the settled boundaries of the courts of justice.

As, therefore, the bill in respect to one object, the discovery, did not require an affidavit, and in respect to the other two objects, to wit, the examination of witnesses, and the relief, did require one, this leads me to consider,

2. The second question, viz. whether a demurrer to the whole bill, for the want of such affidavit, be good.

It is an established and convenient rule of pleading, in chancery, that you may meet a complainant's bill by several modes of defence. You may demur to one part, answer to another, plead to a third, and disclaim to a fourth part of the bill. If, therefore, a bill seeks a discovery of a matter which is proper, and likewise seeks discovery of other matter, which is not proper; as, for instance, matter which would charge the defendant with a crime, the defendant must answer to the proper, and may demur to the improper questions put to him, or he may answer to the proper questions, taking no notice of the residue. So, if a bill, as in the present case, seeks for a discovery, and also for relief, consequential to such discovery, the bill being good for the one object, without affidavit, and not for the other, the defendant ought to meet the *sound* part of the bill by an answer, and be left to his own option whether he will demur or not, to the other part.

I do not find any authoritative rule declaring that if a bill be bad in part only, and good in other parts, the whole bill thereby becomes vitiated, and will be dismissed on a general demurrer. The settled rule is most assuredly otherwise, and a bill, combining

discovery and relief, without affidavit, though liable to demurrer, as to the relief sought, shall, nevertheless, be retained and supported for the purpose of discovery.

ALBANY.  
 Laight and ors.  
 v.  
 Morgan & ors.

A different rule would be very inconvenient and unnecessarily grievous. To support a demurrer to a whole bill, when part of it, had that part been separate and distinct, would have required an answer, is to send a party back to travel the same ground over again, with much expense and loss of time, and to no useful purpose. He must file the same bill anew, with the omission only, of the exceptionable prayers, and repeat the former process for bringing the defendant into court, who, when he arrives, will be in no better situation, than he was before; since the same answer, which might have been sufficient, and the same consequences which the defendant might have commanded *then*, must follow *now*.

I am, accordingly, of opinion, that the demurrer which, instead of being confined to the exceptionable parts of the bill, went to the whole bill, ought to have been overruled, and, consequently, that the decree of the court of chancery, allowing the demurrer of the respondents, and dismissing the bill of the appellants, must be reversed.

Judgment of reversal unanimously.

N. B. LANSING, C. J. though he coincided in the judgment of the court, said, that a bill for discovery and relief, without affidavit, was a *nullity* and a general demurrer to the *whole bill good*.

ALBANY.

Ludlow

v.

Dale.

\* *Ante*, page 259.Ludlow *against* Dale.

*The opinion of Mr. Justice KENT, in this cause, having been referred to in his argument on the conclusiveness of foreign sentences,\* is given now, as it was not till the preceding sheet was worked off, that it came to the hands of the compiler.*

THIS was an action on a policy of insurance on the schooner *Paragon* and her cargo, from *Aux Cayes*, or any other port in *Hispaniola*, to the *United States*, and warranted *American*. The insurance was effected for *Moses Myers*, of *Virginia*, and the vessel was captured by a *British* frigate on her return from *St. Domingo*, laden with the produce of that island, and was carried into *Jamaica*; and by the vice-admiralty court of that island was condemned as good and lawful prize.

Two questions have arisen on this case.

1. Whether the sentence of the admiralty concludes all further inquiry respecting the neutrality of the property.

2. If it does not, whether the testimony offered, appears to warrant the sentence of condemnation at *Jamaica*.

When this cause was argued at the last *July* term, I observed, with some surprise, that the counsel on each side, seemed in a great degree to abandon the first point, and taking it for granted, that the question on the warranty was still open, they entered fully, and, I think, with much force and ability, into a discussion of the several *matters of fact*, on which the proceedings in the admiralty must have been founded. I shall, however, confine myself to the consideration of the first question, because, in my opinion, that *alone* governs the cause. If the sen-



tence of condemnation by a foreign court of admiralty, be conclusive, over the question of neutral property, it is unnecessary to examine any further. If it be not conclusive, and the question is still open for discussion, it is then a question of fact to be submitted to a jury, and we have nothing to do with it, other than to send it back to the proper tribunal.

It is a clear and settled principle of law, that the sentence of a court of competent jurisdiction is, as to the direct point under decision, conclusive upon all other courts of the state, within whose limits it be pronounced.

Even *foreign* decrees, whether sustaining a claim or dismissing it, are generally, from a regard to utility, and *ex comitate*, received with respect, and held binding, unless there be some very cogent reasons against them, by the regular tribunal of all other nations, where the administration of justice is orderly and civilized.

But the sentence of foreign courts of admiralty, are especially, received as binding, because they proceed upon general principles of the law of nations, applicable to all suitors, and of universal extent and reception. As these courts are all governed by one and the same law, equally known to every country, and equally open to all the world, all persons are, therefore, concluded by their sentences, in cases within their jurisdiction. We find, accordingly, the *English* courts, as early as the reign of Charles II. regarding the decision of the *French* admiralty in a question of *prize*, as *conclusive* upon them, though at that time, *England* was a neutral, and *France* a belligerent power, and the judges observed, that sentences in courts of admiralty ought to bind generally, according to the *jus gentium*.

ALBANY.

Ludlow

v.

Dale.

2 *Ersk.* 734.  
2 *Str.* 733. 3  
*Durnf.* 125. 12  
*Viner*, 95. 133.  
128. 129. *Str.*  
1078. 3 *Mod.*  
194. 195.

2 *Ersk.* 735. 4  
*Durnf.* 185.  
192. *Str.* 733.  
2 *Kaima*, 365.  
376. 1 *Black.*  
*Rep.* 258. 260.

*Doug.* 610,  
614, 615, 617.  
2 *Kaima*, 376.  
3 *Durnf.* 330.

*Hughes v. Cornelius, Kaima*,  
473. 2. *Show.*  
242. *Skinn.* 39.

## ALBANY.

Laddow

v.

Dale.

2 *Ld. Raym.*  
893. 935. *Carth.*  
32. see also, 1  
*Atk.* 49, and 2  
*Woodd.* 455.

*Bernardi v.*  
*Motteux, Doug.*  
575. *Barzillay*  
*v. Lewis, Park,*  
359. *De Snuzza*  
*and Ewer, Park*  
361.  
*Saloucci v.*  
*Wooddmason,*  
*Park,* 362.  
*Mayne v. Wal-*  
*ter, Park* 363.  
*Fernandez v.*  
*Dacosta, Park.*  
178.

*Jan. Term,*  
1797.

Lord *Holt* more than once recognised this law, and gave it the sanction of his great name.

In modern times, when the law of nations and commercial law, have been more correctly defined, the doctrine, that sentences of foreign admiralties were conclusive, has been admitted in the fullest latitude, and the *English* court of K. B. have repeatedly and unanimously decided, that condemnation in a foreign court of admiralty, of property warranted neutral, as enemy's property, was conclusive evidence against the insured, of a breach of his warranty.

These several decisions, while they incontrovertibly establish the doctrine, that if no *special* ground of condemnation appears, but the property is condemned generally as *enemy's* property, or as good and lawful prize, other courts are bound to consider the decree as decisive evidence, that the property was not neutral; yet they, at the same time admit, that if the foreign sentence be so ambiguous as to render it difficult to say on what ground the decision turned, or if there be colour to presume the admiralty proceeded on matter not relevant to the issue, evidence will be let in to explain. So if a sentence be on the face of it unjust, and reasons are given for it, manifestly illegal, and against the law of nations, other courts have a right to judge of these reasons, and to determine on their validity, and this was the amount of the decision of this court in the case of *Smith v. Murray and Mumford*.

The *English* law thus understood and explained, I consider as no novel doctrine, but a part of the common law of the land. It is, indeed, the prevailing usage of all countries, whose jurisprudence is enlightened, and whose administration is regular. It could not exist in the *civil law*, because the whole

known world was subject to the *Roman* empire ; but in countries where the civil law has been adopted and modified, the same principle prevails, and a person condemned by a sentence of a foreign court, confessedly competent in the case, can have no redress, but by a court which has power to reverse the decree.

ALBANY.  
Ludlow  
v.  
Dale.

2 Kaim's,  
366.2 Erel. 735.

The decree of the admiralty of *Jamaica* cannot be said to be *res inter alios acta*. The assured, in the present case, was a party to the suit instituted, and the condemnation had there ; he applies here to have the same question agitated there, and which was decided against him, tried anew ; the question, whether his property, which he had warranted to be *American*, had the requisite *insignia* to entitle it to the privilege of neutrality.

I shall forbear to give any opinion on the testimony which was produced and commented upon at the argument, because I am of opinion it is totally irrelevant in the present case, and that the sentence of condemnation being direct, so as to induce a necessary conclusion that neutral or enemy's property was the point in issue and decided ; and containing nothing which appears contrary to the law of nations, is decisive against the plaintiffs, and that judgment ought to be rendered for the defendants.

THE END.



# INDEX

TO

## THE PRINCIPAL MATTERS.

---

### A

#### ABANDONMENT.

See *Insurance*, 2. 4.

#### ACCOUNT.

See *Mortgage*, 1.

1. After a judgment, execution and sale under a mortgage-bond, the court will not open the account on the mortgage though there be some degree of irregularity in the accounts, if they appear to be fairly closed. *Bloodgood v. Zeiley*, 124

#### ACTION.

See *Promissory Note*, 3.

#### ADMINISTRATION.

See *Surrogate*, 1.

#### ADVERSE POSSESSION.

See *Sale*, 1.

#### AFFIDAVIT:

See *Demurrer*, 1.

*Practice*, 4.

#### AGREEMENT.

1. Whether an agreement by a mortgagee who has bought in the mortgaged premises, to divide with the mortgagor, the surplus produce of a re-sale, after deducting debt and costs, if he will show the best lands so as to get for the estate a given sum, be a valid agreement or not, *quere*, *Bloodgood v. Zeiley*, 124

And if valid, *quere* whether the

Vol. III.

showing the lands be not a condition precedent, *ibid.*

#### APPEAL.

See *Practice*, 2.

#### ASSIGNMENT.

See *Usury*, 1.

#### AVERAGE.

See *Insurance*, 4.

### B

#### BILL.

See *Practice*, 1. 4.

#### BOTTOMRY.

See *Insurance*, 1.

### C

#### CASE.

See *Practice*, 3.

#### CESTUI QUE TRUST.

See *Purchase*, 1.

#### CHURCHES.

See *Devise*, 1.

#### COMPUTATION OF VALUE.

See *Pledge*, 1.

1. The rule to compute the value of lands in fact mortgaged, but sold under an idea of a defeasible purchase, is the time when sold, not when redemption asked. *Bloodgood v. Zeiley*, 124

Y Y

**CONDITION PRECEDENT.**  
See *Agreement*, 1.

**CONSIGNMENT.**  
See *Surety*, 1.

**COURTS.**  
See *Foreign Courts*.

- COVENANT.**  
See *Recognition*, 1.
1. On the sale of a note not negotiable, with a covenant by the vendor, to pay the vendee a certain sum, "if the vendee should take all and every legal step the law directs, to prosecute to effect the maker and payee, to wit, if the vendee, and no one in his name, or in that if the maker could recover judgment legally against the maker, on the note, or against the payee in case he had, at the date of the covenant, or should, previous to the suit against the maker, *discharge* the note;" if, in an action against the maker, the payee, according to the laws of the country, go into court, and deny authorising the suit by the assignee against the maker, the assignee cannot maintain an action on the covenant against the vendor, if by the law of the country the payee be, in such case, liable for the amount, without first showing a legal endeavour, by suit, to recover the amount against the payee. Covenants are to be construed, not merely by their letter, but their spirit. *Betts v. Turner*, 305

**D**  
**DECREE.**  
See *Practice*, 2.  
*Statute of Frauds*, 1.

**DEFEASIBLE PURCHASE.**  
See *Computation of Value*, 1.  
*Mortgage*, 1.

- DEMURRER.**
1. When a bill requires an affidavit to some parts, and not to others, a demurrer to the whole for want of that affidavit, is bad. *Laight and others v. Morgan and others*, 344

- DEVISE.**  
See *Tenant at Will*, 1.
1. Our Statute of 1784, enabling churches, &c. to incorporate themselves, does not enable them to take lands by devise. *Jackson ex dem. Smith v. Hammond*, 337.

- DISCOVERY.**
1. A bill for a discovery and injunction to stay proceedings at law, must state some particular matter, which the complainant has a right to seek a discovery of, as material to his defence, and without which he cannot proceed to trial. A mere inquiry, because the grounds of the suit at law are unknown, cannot be maintained, being a fishing bill. *Newherk and Wife v. Willett*, 296

**E**  
**EJECTMENT.**  
See *Tenant at Will*, 1.

**EQUITY.**  
See *Practice*, 1.

**EVIDENCE.**  
See *Foreign Courts*, 1.

**EXECUTOR.**  
See *Pledge*, 1.  
*Purchase*, 1.

F

FACTOR.

See *Set-Off*, 1.

1. On a sale by the known factor of a house, the principal may immediately maintain an action against the vendee. Factors in *New-York* may, by custom, sell on a credit, at the risk of their principal. *Browne and others v. Robinson and Hartshorne*, 341

FISHING BILL.

See *Discovery*, 1.

FOREIGN COURTS.

See *Insurance*, 3.

1. Judicial acts of foreign tribunals are *prima facie* to be deemed correct; therefore, no inference to be made against them. *Smith v. Williams*, 110

FOREIGN SENTENCES.

See *Insurance*, 3.

G

GIFT.

1. A parol gift of lands creates only a tenancy at will, by the statute of frauds. *Jackson ex dem. Jane Van Alen v. Rogers*, 314

H

HEARING CAUSES.

See *Practice*, 3.

HOLIDAY.

See *Promissory Note*, 1.

HOMINE REPLEGIANDO.

See *Recognisance*, 1.

I

IMPROVEMENT.

See *Statute of Frauds*, 1.

INCIDENT.

See *Water*, 1.

INFERENCE.

See *Foreign Courts*, 1.

INJUNCTION.

See *Promissory Note*, 2.  
*Discovery*, 1.

INSOLVENT.

1. If the indorsor of a note pay it after the discharge of the insolvent maker, under the insolvent law, the discharge is no bar to a subsequent recovery against the maker. *Frost v. Carter*, 311

INTEREST.

See *Insurance*, 1.

INTERLOCUTORY ORDER.

See *Practice*, 2.

INSURANCE.

1. An owner of a ship bottomed for more than her value has not an insurable interest in her. *Smith v. Williams*, 110
2. To constitute a technical total loss of a ship by damage from the perils insured against, she must be injured to the amount of half her value or more, after deducting the one-third, new for old, allowed the underwriter; that is, she must be injured to the extent of three-fourths of her value or more, to warrant an abandonment on account of deterioration. *Smith v. Bell, Bell and Watson*, 153
3. In an action on a policy of insurance the sentence of a foreign court of admiralty is not conclusive on the character of the property, in opposition to

the warranty. *Vandenhoevel v. The United Insurance Company*,  
217

4. Under a policy on a chariot "free from average," but in which jettisons make one of the perils insured against, if the box of the chariot be thrown overboard in a storm, it is a total loss, and the insured entitled, on abandoning, to recover as for such, though the carriage be on deck. *Judah v. Randal*,  
324

## J

## JETTISON.

See *Insurance*, 4.

## JOINT TENANTS.

See *Tenants in Common*, 1.

## L

## LANDS.

See *Gifts*, 1.

## LEASE.

See *Tenant at Will*, 1.

## MANDAMUS.

See *Sessions*, 1.

## MERITS.

See *Sessions*, 1.

## MILLS.

See *Water*, 1.

## MORTGAGE.

See *Account*, 1.

*Agreement*, 1.

*Computation of Value*, 1.

*Pledge*, 1.

*Usury*, 1.

1. If after a mortgage be forfeited, and execution sued out on a judgment recovered on the

bond accompanying it, a conveyance, to secure a portion of the mortgage-money, be made of other property, redeemable on paying a certain sum at a future day, such conveyance will partake of the quality of the original transaction, and be deemed a mortgage, and not a defeasible purchase; therefore, if after lapse of the day for repayment, the lands so conveyed be sold to a *bona fide* purchaser, though the purchase will not be impeached, the grantor will be entitled to an account, and the sum at which the land was sold, with interest, will be the amount for which he will be entitled to credit, though he did not demand a redemption, for more than six years after the day of repayment. *Bloodgood v. Zeiley*,  
124

## N

## NEW FOR OLD.

See *Insurance*, 2.

## NEW TRIAL.

See *Sessions*, 1.

## NOTICE.

1. A conveyance with a recital of the intent of a purchase, is a conveyance with notice, and the grantee takes subject to trusts implied as well as expressed. *Cuyler and others v. Bradt and others*,  
326

## NOTICE TO QUIT.

See *Tenant at Will*, 1.

## O

## ORDER.

See *Practice*, 2.



P

PATENT.

See *Tenants in Common*, 1.

PAYMENT.

See *Statute of Frauds*, 1.

PERFORMANCE.

See *Purchase*, 1.

*Statute of Frauds*, 1.

PLEDGE.

1. On the deposit of a pledge, when no day of redemption is limited, the right of redemption descends to the personal representatives of the pawnor; if the pawnor sell the pledge before application to redeem, and without demanding payment, he is answerable for the value of the pledge at the time application to redeem is made, and it is not in such case necessary to make an actual tender of the balance that at the time of such sale might have been due. *Corteylout v. Lansing*, 200

PRACTICE.

See *Discovery*, 1.

1. Where relief at law is doubtful, equity will retain the bill. *Ludlow and Ludlow v. Simond*, 1
2. If a cause come before this court on appeal, from an interlocutory order, and the whole merits of the case appear, the court will make a final decree and direct the chancellor to carry it into effect. *Bush v. Livingston and Townsend*, 66
3. A cause cannot be set down for hearing till cases are delivered. *Hallet and Bowne v. Jenks*, 86
4. Where a bill seeks an examination of witnesses *de bene esse*, on account of age &c. an affida-

vit of the facts on which the application is founded is necessary. So on a bill to have a title established, and for quiet possession; for whenever a bill seeks to transfer a matter cognisable by law, to chancery, an affidavit of the facts on which it is required, should be stated. *Laight and others v. Morgan and others*. 344

PRESUMPTION.

See *Promissory Note*, 2.

PRINCIPAL.

See *Factor*, 1.

*Surety*, 1.

PROMISSORY NOTE.

See *Insolvent*, 1.

*Covenant*, 1.

1. A promissory note falling due in *New-York* on the 4th of *July*, is payable the 3d, the 4th being by custom a public holiday in that place. *Lewis v. Burr*, 195
2. When a note is purchased after due, every presumption is to be made against the purchaser. Therefore if he state it to have been generally in such a year, and the maker has assigned his property under the insolvent law, on the 16th of *January* in that year, it shall be presumed the purchase was after the assignment. A note purchased after due, and after an assignment under the insolvent law, cannot, in an action by the assignees, in the name of the insolvent, be set off against a debt due to the insolvent's estate. *Johnson v. Bloodgood*, 303
3. An action is maintainable in our courts on a promissory note within our statute by the holder, though made in *Connecticut*,

where the suit must be in the name of the original payee.

*Lodge v. Phelps*, 321

#### PURCHASE.

See *Mortgage*, 1.

*Promissory Note*, 2.

*Sale*, 1.

1. If an executor has a power to sell for the benefit of a third person, a purchase by him from his *cestui que trust* is not favoured in equity, and a bill by him for a specific performance cannot be maintained; but it seems that a purchase by a trustee who is also a *cestui que trust*, may, if to save the property from loss, be sustained.  
*Munro v. Alaire*, 183

#### R

##### RATIFICATION.

See *Tenant at Will*, 1.

##### RECITAL.

See *Notice*, 1.

##### RECOGNISANCE.

1. If a recognisance in a *homine replegiando* be, that the slave claimed, should prove his liberty, and personally appear in Court, and prosecute his suit with effect, it is forfeited by the appearance and surrender of the slave to the person claiming, notwithstanding he be on such surrender accepted. *Covenhoven v. Seaman and others*, 322

##### REDEMPTION.

See *Computation of Value*, 1.

*Mortgage*, 1.

*Pledge*, 1.

##### RELATION.

See *Sale*, 1.

##### RELEASE.

See *Surety*, 1.

*Water*, 1.

##### RELIEF.

See *Practice*, 1.

#### S

##### SALE.

See *Computation of Value*, 1.

*Mortgage*, 1.

*Purchase*, 1.

*Statute of Frauds*, 2.

*Surety*, 1.

1. If a bargain for the purchase of land be concluded, and at the expiration of some time, the conveyances duly executed, the subsequent deeds will so far have relation to the day of concluding the bargain, that an intermediate sale by the vendee, will be good against him and his privies, and the possession of the original vendor cannot be urged as a possession adverse to the vendee, and therefore, that nothing passed by his deed, *Jackson ex dem. Loan Officers of Rensselaer, and Crabb v. Bull*. 301

##### SESSIONS.

1. The Sessions cannot grant a new trial on the merits; if they do, a *mandamus* will go forbidding them to proceed. *The People v. Sessions of Chenango*, 319

##### SETTING DOWN CAUSES.

See *Practice*, 3.

##### SET-OFF.

See *Promissory Note*, 2.

1. Where goods are sold by the known factor of a house, a set-off cannot be made against them by the purchaser, for a debt due from the factor in his own right, if the goods be actually those of the principal, though the factor do carry on business for himself, and nothing be said at the time of sale, respecting the ownership of the goods. *Browne and others v. Robinson and Hartshorne*, 341

**SPECIFIC PERFORMANCE.**

See *Purchase*, 1.

*Statute of Frauds*, 1.

**STATUTE OF FRAUDS.**

See *Gift*, 1.

1. Payment of consideration-money, possession and making improvements, take a case out of the statute of frauds, and will entitle to a decree for a specific performance. *Wetmore v. White and White*, 87
2. A sale by loan officers is within the statute of frauds. *Jackson ex dem. the Loan officers of Rensselaer, and John Crab v. Bull*, 301

**SURETY.**

1. If a surety engage to make good the deficiency arising from a sale of goods at a given place, and consigned to the person to whom the security is given, who has the whole controul of the adventure, a sale by the consignee at another place releases the surety. *Ludlow and Ludlow v. Simond*, 1

**SURROGATE.**

1. The Surrogate has a discretionary power to elect out of those of the next of kin of the intes-

tate, any one in an equal degree, and grant to such person the administration. *William and George Taylor v. Delancey*, 149

**T**

**TENANTS IN COMMON.**

1. Where several patentees bear in equal proportions the expense of obtaining a Patent, and by the recital of a deed among themselves, it appears they intended to purchase in common, they will be taken as tenants in common and not as joint-tenants, though the patent be to them jointly. *Cruyer and others v. Bradt and others*, 326

**TENANT AT WILL.**

See *Gift*, 1.

1. If a tenant at will lease lands, the mere permitting the lessee to build and enjoy under the term, is not a ratification of the lease by the owner of the land, nor will it prevent him from legally devising it, and his devisee may recover in ejectment without notice to quit. *Jackson ex dem. Jane Van Alen v. Rogers*, 314

**TOTAL LOSS.**

See *Insurance*, 2. 4.

**TRUSTEE.**

See *Purchase*, 1.

**U**

**USURY.**

1. A security made on a good and bona fide consideration, cannot be impeached on account of a usurious transfer; therefore, where a mortgage is assigned to a third person, who pays what

is due on it to the mortgagee, the mortgagor cannot avoid it in the hands of that third person, on account of an agreement to repay him a sum exceeding the money paid and legal interest, but such excess will be denied, and only the money actually paid and lawful interest allowed. *Bush v. Livingston and Townsend.* 66

## V

## VALUE.

See *Computation of Value*, 1.

## W

## WARRANTY.

See *Insurance*, 3.

## WATER.

1. The water of a raceway of a mill will, on a sale of the mill, pass as an incident. If the water in a stream be owned by two persons, whose lands are on opposite sides, and they agree to erect mills on the land of one, and turn the whole stream to the mills, it is an appropriation of the water to the mills, and if they be held jointly or in common, a release of the right of one tenant in the mills, will pass his right in the water also. *Wetmore v. White and White,* 87

## WITNESS.

See *Practice*, 1.

*J. H. W. C. M. G.*



